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IN THE

Supreme Court of the United States

OCTOBER TERM 1937.

No. 566.

GUARANTY TRUST COMPANY OF NEW YORK,
Petitioner,

against

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

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March 7, 1938.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1937.

GUARANTY TRUST COMPANY OF NEW YORK,
Petitioner,

against

THE UNITED STATES OF AMERICA.

No. 566.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the United States District Court for the Southern District of New York (R. 257-74) is not reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 281-91) is reported in 91 F. (2d) 898.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered August 23, 1937 (R. 292). The petition for a writ of certiorari was filed on November 9, 1937, and was granted on December 13, 1937 (R. 293). The

jurisdiction of this Court rests upon the provisions of Section 240 (a) of the Judicial Code, 28 United States Code § 347(a), as amended by the Act of February 13, 1925.

Questions Presented.

By virtue of an assignment received from the State of Russia in 1933, the United States brought suit in the District Court for the Southern District of New York against the petitioner, a New York corporation, to recover a deposit account which the State of Russia had had with the petitioner prior to 1918 and which in 1918, upon notice to the State of Russia, the petitioner had set off to pay its own claims *pro tanto* against the State of Russia. The statute of limitations of the State of New York for this type of action is six years.

The questions are:

1. Is a foreign sovereign in an action at law in a United States court in New York subject to the defense of the general statute of limitations, applicable to all ordinary litigants, as established by the law of New York?

2. Is the indebtedness of a New York bank to a foreign state, in the form of a deposit account, entitled to any peculiar privilege or exemption of sovereignty in a municipal court of the United States whose jurisdiction is invoked by the depositor or its assignee?

3. Does the assignment of Russian funds in the United States, executed by the Soviet Government to the United States on November 16, 1933, override the statute of limitations of the State of New York?

Statutes and Executive Agreement Involved.

Appendix I of this brief, pages 92-5 below, contains the applicable New York statute of limitations, the procedural rules under which petitioner's motion to dismiss was made, the applicable portions of the Conformity Act and the Rules of Decision Act, and the executive agreement between the President of the United States and the Soviet Commissar for Foreign Affairs concluded November 16, 1933 (R. 3).

Statement of the Case.

The Action. This action was brought by the United States on September 21, 1934 (R. 2) to recover the sum of $4,976,722.78 alleged to have stood with the petitioner in a deposit account of the State of Russia opened on July 15, 1916, and assigned to the United States by the Government of the State of Russia on November 16, 1933 (R. 3). The petitioner was and is a banking corporation under New York law having its principal office and place of business in New York City (R. 3).

Upon motion of the petitioner based on affidavits in accordance with the New York practice[1], and upon proof showing that the petitioner had repudiated with notice any deposit liability to the State of Russia prior to 1922, Judge Caffey in the District Court applied the six-year statute of limitations, and dismissed the complaint (R. 257-77). The

[1] The New York practice (Rule 107, p. 93 below) provides that certain affirmative defenses, including the statute of limitations, may be heard and determined upon motion and affidavits. This is an adaptation to actions at law of the old equity practice of raising questions of law by a plea in bar. *Herzog* v. *Brown*, 217 N. Y. App. Div. 402, 404 (1926).

United States appealed. The Circuit Court of Appeals for the Second Circuit reversed the judgment of dismissal on the sole ground that the statute of limitations does not run against a foreign sovereign, Judge Chase dissenting without opinion (R. 281-92).

This Court granted certiorari (R. 293).

The Bank Account Here Involved. The deposit account in suit was opened by the Imperial Russian Government with the petitioner in July 1916 in the name of Section Etrangère Ministère des Finances (R. 175) meaning the Foreign Section of the Ministry of Finance of that Government. It was in every respect an ordinary commercial deposit. It had originated as the proceeds of a loan by a group of New York banks to the Imperial Russian Government (R. 227); but the account was overdrawn on July 2, 1917 (R. 80), and the entire balance thereafter created and now claimed in this action by the United States as assignee of the State of Russia is the proceeds of a deposit with the petitioner made July 12, 1917 by the Russian Financial Attaché Serge Ughet (R. 80, 110). Interest was credited and debited on the account monthly in accordance with ordinary commercial banking practice (R. 248). Drawings on the account were made by letter or cable from the Foreign Section, up to the time of the Soviet Revolution (R. 229). The latest payment by the petitioner out of the account in regular course of operations was made July 10, 1917 (R. 230). The latest instruction from the Foreign Section with respect to the account was received by the petitioner on August 25, 1917 (R. 229-30).

Revolution in Russia. The first Russian Revolution occurred March 16, 1917, and the resulting Provisional Government of Russia was recognized by the United States on

March 22, 1917 (R. 216-7). The account in suit continued to be operated by the petitioner in the same way as formerly upon the assurances of the same Russian Financial Attaché (R. 230, 253-4).

On November 7, 1917, occurred the second or Soviet Revolution. The resulting regime, first known as the Provisional Workers' and Peasants' Government (R. 217), was not recognized by the United States until November 16, 1933 (p. 93 below). After November 7, 1917, the petitioner permitted no withdrawals from the account in suit (R. 80, 230). The balance in the account as it stood on December 12, 1917, is the amount now claimed by the United States as assignee of the State of Russia (R. 3).

Petitioner's Claims against State of Russia. On December 27, 1917, the new revolutionary government in Russia enacted a decree nationalizing the Russian banks (R. 81). On February 3, 1918, it enacted decrees annulling the share capital of the banks and repudiating the loans of the Russian Government (R. 81). The petitioner had ruble accounts with various Russian banks which at the dollar valuation thereof carried on the books of the petitioner amounted to more than $9,000,000 (R. 81-2). Upon receiving from a representative in Russia information as to the Soviet decrees and further information that the Russian commercial banks had accordingly ceased to exist and that there was no hope of payment of the petitioner's accounts with them, the petitioner on February 25, 1918, closed the account in suit by transferring the credit balance therein to a new consolidated account (R. 81-2). In this consolidated account the account in suit together with dollar accounts of Russian banks was merged and set off against the amounts

owed by Russian banks to the petitioner (R. 81-2). The total amount owed by the Russian Government to the petitioner on February 25, 1918, was more than $9,000,000, while the total owed by the petitioner to the Russian Government, including the account in suit, was $7,226,000 (R. 82).

On March 14, 1918, this consolidation of accounts was expressly ratified and confirmed by the Executive Committee of petitioner's Board of Directors (R. 82-3).

Representation of the State of Russia in the United States. After the recognition of the Provisional Government of Russia by the United States, Serge Ughet was on April 7, 1917, appointed Financial Attaché to the Russian Embassy (R. 185). Mr. Ughet had since January 2, 1917, been a representative of the Ministry of Finance in the Russian Supply Committee in New York (R. 174-5). He continued to be recognized by the United States as Russian Financial Attaché until November 16, 1933 (R. 218, 194). During the absence of the Ambassador, Mr. Ughet was from December 3, 1918, to July 31, 1919, recognized by the United States as Chargé d' Affaires ad Interim (R. 186, 219).

Boris Bakhmeteff was received as Russian Ambassador on July 5, 1917 (R. 217, 186), and continued to be recognized as such Ambassador until his resignation effective June 30, 1922 (R. 218-9). Upon his resignation he vested the custody of the Russian Government's property in this country in Mr. Ughet (R. 191-3), and Mr. Ughet's diplomatic status with the United States was not considered by the State Department to be altered by the termination of the Ambassador's duties (R. 246-7).

In virtue of the recognition so accorded them by the political department, Mr. Bakhmeteff and Mr. Ughet were ex-

pressly held by the courts authorized to sue on behalf of the State of Russia to recover its assets in this country.[1]

Accrual of Cause of Action. After November 7, 1917, and before June 30, 1922, Mr. Bakhmeteff as Ambassador and Mr. Ughet as Financial Attaché of the recognized Russian Government made various attempts to obtain possession of the account in suit for the purpose and the use of their Government. These transactions are set forth in the depositions of the Ambassador (R. 43-68) and of the Financial Attaché (R. 9-43), taken by order pursuant to the New York practice in lieu of their affidavits, upon notice and with full cross-examination, and are also set forth in the uncontradicted affidavits of the Assistant Financial Attaché, Mr. Ter-Assatouroff (R. 69-73, 151-63, 230-5) and of officers and of former officers of the petitioner. Upon the evidence adduced in the District Court, Judge Caffey found that there was *no dispute* with respect to the accrual of the cause of action in favor of the State of Russia on at least six separate occasions prior to June 30, 1922. The New York statute of limitations as construed by the highest court of New York begins to run upon an unequivocal repudiation or denial of liability by a bank as well as upon a demand and refusal. *Tillman* v. *Guaranty Trust Company* (1930) 253 N. Y. 295.

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[1] *Russian Government* v. *Lehigh Valley R. Co.*, 293 F. 133, 293 F. 135 (D. C. S. D. N. Y. 1919), affirmed 21 F. (2d) 396, certiorari denied 275 U. S. 571; *State of Russia* v. *Bankers Trust Company*, 4 F. Supp. 417, 419 (D. C. S. D. N. Y. 1933), affirmed 83 F. (2d) 236, certiorari denied 299 U. S. 563. See also *Agency of Canadian Car & Foundry Co.* v. *American Can Co.*, 258 F. 363 (C. C. A. 2, 1919).

Decision of the District Court (R. 257-77).

Judge Caffey in his opinion reviewed the conceded facts with reference to the recognition by the United States of the various Russian governments, the representation of Russia in this country, the establishment of the account in suit, and the set-off thereof by the petitioner in payment of its claims against Russia (R. 257-9).

He then discussed the evidence in order to ascertain whether there was a triable issue of fact or whether the facts, in so far as material, were "without serious or substantial dispute." Reviewing the evidence in detail he found:

1. That Mr. Bakhmeteff as Ambassador knew that the petitioner had taken the set-off and refused to surrender the account (R. 261-2). This finding is based upon the express and uncontradicted testimony of Mr. Bakhmeteff:

> "I would say what I knew was this: that the reason, or all of the reason, why they [the petitioner] refused to give this money was the fact that they made that offset." (R. 56.)

2. That Mr. Bakhmeteff was informed by letter from his counsel dated September 23, 1921 (R. 148-9) that the petitioner refused to give up the account in suit (R. 262).

3. That Albert Breton, a Vice-President of the petitioner, had informed Mr. Ughet prior to June 15, 1919, that the petitioner would not transfer the account in suit because it had taken it as a set-off (R. 262). This finding rests in part upon a letter produced by the United States in which a Federal Reserve Board officer informed the Treasury under date of May 7, 1918, that Mr. Breton had advised him of the set-off (R. 200-1).

4. That about June 16, 1919, Harold Stanley, a Vice-President of the petitioner, stated in the presence of Mr. Ughet that the account in suit was not available for use of the Russian State because Russia owed the petitioner a sum in excess thereof (R. 263).

5. That by letter of July 1, 1919, to his counsel (R. 140) Mr. Ughet said that the petitioner had refused to pay the account in suit because of the seizure of the petitioner's funds by the Bolsheviks (R. 263). Judge Caffey found this to be

> "an express admission in writing by Ughet that on or prior to July 1, 1919, the bank had unequivocally repudiated liability."

6. That upon attempting through one John H. Fulton as Chairman of a Protective Committee to draw $1,625,000 out of the account in suit for payment of interest on a Russian loan, Mr. Ughet was informed by letter of July 11, 1919, that the petitioner refused to pay (R. 263-4).

Finding these clearly established instances of unequivocal repudiation of liability by the petitioner communicated to the Russian Ambassador and the Financial Attaché, the District Court concluded that there was no triable issue of fact.

He then took up the questions of law. With respect to these he held—

First, that notice of repudiation to the Russian Ambassador and the Russian Financial Attaché bound the Russian State and set the statute of limitations running (R. 268-71).

Second, that the statute of limitations runs against a foreign sovereign, inasmuch as the reasons of public policy

which avail to exempt the local sovereign therefrom have no application to a foreign sovereign (R. 271-2).

Third, that prior to November 16, 1933, the United States had no legal interest in the account in suit (R. 272-3).

Fourth, that recognition of the Soviet Government is not retroactive in such sense as to destroy a perfected or completed act or right accruing within the territorial limits of the United States, such as the running of the period of limitations (R. 273-4).

Fifth, that there was no suspension of the statute of limitations after it began to run (R. 274).

The District Court therefore held that before recognition of the Soviet Government and before its assignment of the account in suit to the United States the six-year statute of limitations had run and had completely barred, in favor of the petitioner, the cause of action sued on.

Decision of the Circuit Court of Appeals (R. 281-92, 91 F. [2d] 898).

The decision of the Circuit Court of Appeals reversing the judgment of dismissal turned on a single point, namely the question whether the statute of limitations runs against a foreign sovereign. Judge Swan wrote the opinion of the Court, and Judge Manton concurred with an opinion. Both recited the proceedings below and the findings of the District Court with respect to the accrual of the cause of action. Both predicated the decision of the Circuit Court on the single question of the running of limitations against a foreign sovereign. Judge Swan said (R. 282, 91 F. [2d] at 899):

> "The question whether a foreign sovereign is affected by a State statute of limitations is one upon which no direct authority has been found."

Judge Manton said (R. 286, 91 [2d] at 900):

> "The question for us to determine is whether the right of the Russian Government to the moneys here involved had been outlawed at the time that government executed its assignment of such moneys to the United States on November 16, 1933."

Neither judge could, of course, have arrived at that question without first coming to the conclusion that the District Court was right in finding that there was no triable issue with respect to the accrual of a cause of action. If there had been a triable issue in that respect, the Circuit Court of Appeals would have sent the case back for trial. The United States as appellant had urged as Point I of its brief in the Court of Appeals, pages 15-24, the existence of a question of fact in the case. This contention the Circuit Court of Appeals rejected in deciding the question of law with respect to the running of limitations against a foreign sovereign.

On this point Judge Swan analyzed the cases, found no controlling authority, and held that the principle that a sovereign ought not to suffer from the negligence of his officers and servants cannot be abrogated by state legislation with respect to a foreign sovereign any more than it can with respect to the United States (R. 282-4, 91 F. [2d] 898-900). He cited *U. S.* v. *Belmont,* 301 U. S. 324, as justifying this conclusion. He held that to exempt from limitations the United States but not a foreign sovereign is to accord to the latter less than full sovereign rights, and that such a question is one pertaining to international relations over which the national government has complete control.

Judge Manton in his concurring opinion (R. 285-91, 91 F. [2d] at 900-3) treated the same question on the plane of sovereign immunity. He also quoted the language of this Court in *U. S.* v. *Belmont* in support of his conclusion.

Judge Chase dissented without opinion (R. 284, 91 F. [2d] at 900).

Specification of Errors to be Urged.

1. The Circuit Court of Appeals erred in holding that the statute of limitations of the forum does not bar a foreign sovereign.

2. The Circuit Court of Appeals erred in holding that the giving of due effect to the Soviet assignment to the United States required it to disregard the statute of limitations of the forum.

3. The Circuit Court of Appeals erred in reversing the judgment of dismissal.

Summary of Argument.

The statute of limitations of the forum runs against a foreign sovereign because the rationale of the exemption therefrom accorded to sovereigns is limited to the sovereign of the forum. The statute of limitations is binding upon all plaintiffs other than the domestic sovereign who invoke the jurisdiction, and the application thereof to foreign sovereigns effects no greater diminution of their dignity than any other rule of the forum which they accept upon invoking its remedies. The defense of limitations is favored

in the United States courts as subserving the interests of justice and wise policy.

By virtue of its transactions with the petitioner prior to June 30, 1922, the State of Russia was therefore barred under the law of New York and the United States at the time of the assignment by the State of Russia to the United States. The United States took no greater right by the assignment than its assignor had. The retroactivity accorded by this Court to the recognition of the Soviet Government on November 16, 1933, does not repeal or affect the perfected defense of limitations based upon transactions by the petitioner in the United States with the prior Government of Russia.

The assignment of the State of Russia to the United States is not a treaty in the constitutional sense, and could not and did not assume to repeal a State statute of limitations adopted by Congress for the United States courts. The holding in *U. S.* v. *Belmont,* 301 U. S. 324, does not affect the running of limitations upon claims assigned by the State of Russia.

I.

The statute of limitations of the forum binds foreign sovereigns, and at the time of the assignment of this claim to the United States it was barred by limitations.

The decision of the Circuit Court of Appeals for the Second Circuit in this case is the first decision in any court in all the world, so far as we have been able to ascertain, to the effect that a foreign sovereign is exempt from the

statute of limitations. It is the first case in which the exemption of the local sovereign, accorded by many cases in the English-speaking countries, has been broadened to apply to a foreign sovereign.

A. The principle upon which exemption from limitations has heretofore been accorded to local sovereigns is one limited in its nature to the sovereign of the forum and is not extensible to foreign states.

In the English cases the exemption of the sovereign from limitations or laches is predicated primarily on the prerogative of the Crown, only secondarily on public policy. The oldest statement of the rule in the books is probably that of Bracton, *De Legibus,* Lib. ii, c. 5, Section 7. Writing in the thirteenth century, Bracton describes certain items of common good appertaining to the King, such as the tax power, and then describes other things which appertain to the Crown as a matter of privilege,[1] such as wreckage of the sea, treasure trove, and fish royal. With respect to both these classes of items in the royal prerogative, Bracton says:

> "* * * for duration of time does not in this instance diminish the injury [to the King from loss of his right] but increases it, nor in the first instance nor in this does time run against the King, * * *."

In the *Magdalen College* case (1616) 11 Co. Rep. 66b, 74b, the Court said:

> "That where the King has any prerogative, estate, right, title, or interest, that by the general words of an Act he shall not be barred of them, as in the said case of

[1] *Quae pertinent ad coronam propter privilegium regis.*

reasonable aid, the King has an estate and interest in it, and therefore the general words of the Act of Westminster 1. cap. (36) 46. shall not extend to it. Also the King has a prerogative *quod nullum tempus occurrit Regi*, and therefore the general acts of limitation, or of plenarty, shall not extend to him; * * *"[1]

The rule of strict construction in the interest of the royal prerogative was stated by Hobart, L. C. J., in *Sir Edward Coke's* case (1624) Gobd. 289, 295:

"The King is *parens legum*, because the laws flowed from him: * * * The law amplifies everything which is for the King's benefit, or made for the King. If the King releaseth all his debts, he releases only debts by recognizance, judgment, obligation, specialtie, or contract: everything for the benefit of the King shall be taken largely, as everything against the King shall be taken strictly; and the reason why they shall be taken for his benefit is because the King cannot so nearly look to his particular, because he is intended to consider *ardua regni pro bono publico*. The prerogative laws is not the Exchequer law, but it is the law of the realm for the King, as the common law is the law of the realm for the subject: * * *."

By the time of Bacon's Abridgment (1736), the exemption of the Crown from limitations was more definitely expressed as a matter of policy than of privilege. Bacon says:[2]

"6. That no laches can be imputed to him; and therein, of the Maxim, *Nullum Tempus occurrit Regi*.

From the presumption that the king is daily employed in the weighty and public affairs of government, it hath become an established rule at common law, that no laches shall be imputed to him, nor is he in any way to

[1] See also *Sir William Candish's* case (1567) 1 Plowd. 321, where the rule *nullum tempus occurrit regi* was invoked to compel a settlement by the estate of the Royal Treasurer, and in the ensuing pardon "it was recited, for the maintenance of the prerogative, that the law was with the Queen in the case."

[2] Abridgment tit. Prerog. E 6.

> suffer in his interests, which are certain and permanent; and his privilege, *quod nullum tempus occurrit regi*, has been confirmed by the statute *de praerogativa regis*."

Similarly Blackstone said in his Commentaries (1753):[1]

> "In further pursuance of this principle [that the king is above the law] the law also determines that in the King can be no negligence or *laches*, and therefore no delay will bar his right. *Nullum tempus occurrit regi* has been the standing maxim upon all occasions; for the law intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subject."

The earliest authoritative discussion of the rule in the American cases is that of Mr. Justice Story in *U. S.* v. *Hoar*, Fed. Cas. 15,373 (1821). The Massachusetts court had already in *Stoughton* v. *Baker* (1808) 4 Mass. 521, on an issue of rights to land, held that (p. 528)

> "no laches can be imputed to the government, and against it no time runs so as to bar its rights."

Mr. Justice Story had to decide whether the statute of limitations of Massachusetts barred the United States as a plaintiff. He held that it did not, and that the Judiciary Act of 1789, § 34, making the laws of the several States rules of decisions in trials at common law in courts of the United States, did not cause the State statute of limitations to run against the national government. He based this conclusion on two grounds. In the first place he analyzed the history of the rule *nullum tempus* in English law, traced its origin to the royal prerogative, and concluded that in its modern phase it was essentially a rule of public policy. On this point he said (p. 330):

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[1] Cooley, 4th Ed., 1899, Vol. 1, page 247.

"The true reason, indeed, why the law has determined, that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its right, though sometimes asserted to be, because the king is always busied for the public good, and, therefore, has not leisure to assert his right within the times limited to subjects (1 Bl. Comm. 247), is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments. We find accordingly, in our own state, the doctrine is well settled, that no laches can be imputed to the government, and against it no time runs, so as to bar its rights (Inhabitants of Stoughton v. Baker, 4 Mass. 528); so, that it is clear, that the statutes of limitations pleaded in this case would be no bar to a suit brought to enforce any right of the state in its own courts."[1]

The reason of public policy stated by Mr. Justice Story for the rule exempting the sovereign from limitations and laches, is that which this Court has repeatedly adopted since that time in its statement of the rule. See for example

U. S. v. *Kirkpatrick,* (1824) 9 Wheat. 720, 735;
U. S. v. *Knight,* (1840) 14 Pet. 301, 315;
U. S. v. *Thompson,* (1878) 98 U. S. 486, 489;
Fink v. *O'Neil* (1882) 106 U. S. 272, 281;
U. S. v. *Nashville etc. R. Co.,* (1886) 118 U. S. 120, 125.

Now it is manifest that the purpose thus subserved by the rule limits its application *to the local sovereign.* As a rule

[1] Likewise in *People* v. *Gilbert,* (N. Y. 1820) 18 Johnson 227, the New York court had held that the reason of the *nullum tempus* rule applies to a representative government, and that the attribute of sovereignty embodied therein had been acquired by the people of the State of New York from the King of Great Britain.

of public policy, it can be concerned only with the sovereign whose policy is involved. The policy of preserving the rights, revenues and property of the United States or of any State from injury and loss by the negligence of its officers, is one which concerns the United States and its citizens only. It is of small concern to it or to them that the public rights, revenues and property of Russia or of France or of any other country be saved from injury and loss by the negligence of their respective Ambassadors and Financial Attachés. The preservation of its property by the application of a similar rule might conceivably be part of the public policy of the foreign country concerned,[1] but by the same token cannot be part of the public policy of the United States.

So much was pointed out by this Court as a possible limitation on the rule *nullum tempus* in *French Republic* v. *Saratoga Vichy Spring Co.* (1903), 191 U. S. 427, 437, although it was held that the interest of the French Republic was there so remote as not to give rise to the contention. Reserving the point for later decision, this Court said (p. 437):

> "It is at least open to doubt whether the maxim *nullum tempus,* applicable to our own government, can be invoked in behalf of a foreign government suing in our courts. The doctrine is one of public policy, and is based upon the assumption that the officers of the government may be so busily engaged in the ordinary affairs of state as to neglect a vindication of its interests in the courts. Whether this exemption can be set up by a foreign government in the prosecution of suits against our own citizens—in other words, whether the latter are not en-

[1] As is shown in Appendix II, pages 96-116 below, the countries of continental Europe and of South America do not apply the rule *nullum tempus* to suits by their own governments. The assumed public policy which the United States in this case would extend for the benefit of a foreign sovereign, the State of Russia, is one which that State has not adopted for herself.

titled to the benefit of the ordinary defenses at law, is a question which does not necessarily arise in this case, and as to which we are not called upon to express an opinion."

The precise point does, however, arise in the instant case, and with respect to it the District Court made what in our submission is a correct application of the reason underlying the rule. Judge Caffey said, after quoting from the *Saratoga Vichy* case (R. 271):

> "As I see it, that reason has no application to a foreign sovereign. It seems to me that it would be monstrous, as matter of public policy, with respect to foreign states which come within our territorial limits and carry on business transactions, including, for example, the making of deposits in banks, to declare that such banks should be held in uncertainty and be denied opportunity to set up as a defense lapse of time, after they had repudiated liability, as a defense. There may be good reason, as matter of policy, why there should be disallowance of the defense as against the local sovereign; but I fail to see any reason why the same should be true so far as concerns a foreign sovereign. On the contrary, it seems to me that there is every reason of policy why it should not be true as to a foreign sovereign which has come into our country and made a deposit in one of our banks."

Reference to the other sources of the rule *nullum tempus* leads to the same result. Viewed in its origin as a perquisite of the King, it is necessarily limited to the King having dominion over the forum. Viewed in the light of the principle that the sovereign is exempted from the application of statutes unless expressly named therein, the rule *nullum tempus* again must be confined to the enacting sovereign. *U. S.* v. *California* (1936) 297 U. S. 175, 186.[1] In neither aspect, any

[1] The phrase used in *U. S.* v. *Herron* (1874), 20 Wall. 251, 261, and *Guarantee Co.* v. *Title Guaranty Co.* (1912), 224 U. S. 152, 156, is "sovereign authority of the country".

more than from the standpoint of its motivating policy, does the rationale of the rule exempting the sovereign from limitations and laches extend to foreign sovereigns who may avail of our courts.

B. In the history of the nullum tempus rule it has never been applied to any other than the local sovereign.

In their brief on behalf of the French Republic as petitioner in the *Saratoga Vichy* case, counsel for the French Republic stated their contention that laches should not be imputed to a foreign sovereign, and added (p. 44):

> "We regret to say that very diligent search has failed to bring to light any authorities which directly and in terms support this contention."

It is as true today as it was in 1903 that no authorities directly and in terms support the extended application of the *nullum tempus* rule which the Circuit Court of Appeals has adopted in this case. This fact we believe to be of some significance, in view of the numerous cases in which the rule has been stated, either as dictum or as direct holding, with respect to the domestic sovereign. These cases are set out in the margin.[1] While they include all the decisions on the point

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[1] United States Courts. *U. S.* v. *Kirkpatrick*, 9 Wheat. 720, 735 (1824); *U. S.* v. *Vanzandt*, 11 Wheat. 184, 190 (1826); *U. S.* v. *Nicholl*, 12 Wheat. 505, 509 (1827); *Dox* v. *Postmaster General*, 1 Pet. 318, 325 (1828); *Smith* v. *U. S.*, 5 Pet. 292, 298 (1831); *Lindsey* v. *Miller*, 6 Pet. 666, 672 (1832); *U. S.* v. *Boyd*, 15 Pet. 187, 208 (1841); *Gibson* v. *Chouteau*, 13 Wall. 92, 99 (1871); *Armstrong* v. *Morrill*, 14 Wall. 120, 145 (1871); *Cooke* v. *U. S.*, 91 U. S. 389, 398 (1875); *Gaussen* v. *U. S.*, 97 U. S. 584, 590 (1878); *U. S.* v. *Thompson*, 98 U. S. 486, 488 (1878); *Minturn* v. *U. S.*, 106 U. S. 437, 444 (1882); *Steele* v. *U. S.*, 113 U. S. 128, 134 (1885); *U. S.* v. *Nashville etc. R. Co.*, 118 U. S. 120 (1886); *U. S.* v. *Beebe*, 127 U. S. 338, 344 (1888); *U. S.* v. *Insley*, 130 U. S. 263, 266 (1889); *Metropolitan R. Co.* v. *District of Columbia*, 132 U. S. 1, 11 (1889); *U. S.* v. *Dallas Military Road Co.*, 140 U. S. 599, 632 (1891); *Boone Co.* v. *Burlington &c. R. R.*, 139 U. S. 684, 693 (1891); *San Pedro etc. Co.* v. *U. S.*, 146 U. S. 120, 135 (1892); *Stanley* v. *Schwalby*, 147 U.

with which we are familiar in this Court and in the English courts, the list of decisions in the State courts could be extended. As it is, the cases noted which announce the exemption of the *local* sovereign from the statute of limitations are 77 in number. Against them is to be set the com-

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S. 508, 514 (1893); *U. S.* v. *American Bell Telephone Co.*, 159 U. S. 548, 554 (1895); *U. S.* v. *Michigan*, 190 U. S. 379, 405 (1903); *Utah Power & Light Co.* v. *U. S.*, 243 U. S. 389, 409 (1917); *U. S.* v. *Whited & Wheless*, 246 U. S. 552, 261 (1918); *U. S.* v. *St. Paul &c. Ry. Co.*, 247 U. S. 310, 314 (1918); *U. S.* v. *New Orleans Pac. R. Co.*, 248 U. S. 507, 518 (1919); *Chesapeake & Delaware Canal Co.* v. *U. S.*, 250 U. S. 123, 125 (1919); *Grand Trunk Wn. R. Co.* v. *U. S.*, 252 U. S. 112, 121 (1920); *Dupont deNemours & Co.* v. *Davis*, 264 U. S. 456, 462 (1924); *Davis* v. *Corona Coal Co.*, 265 U. S. 219 (1924); *U. S.* v. *Minnesota*, 270 U. S. 181 (1926); *Lucas* v. *Pilliod Lumber Co.*, 281 U. S. 245, 249 (1930); *Phillips* v. *Commissioner*, 283 U. S. 589, 602 (1931); *U. S.* v. *Mack*, 295 U. S. 480, 489 (1935); *U. S.* v. *Hoar*, 2 Mason 311, Fed. Cas. No. 15373 (1821); *U. S.* v. *Williams*, 5 McLean 133, Fed. Cas. 16721 (1850); *U. S.* v. *Spiel*, 8 F. 143 (D. C. Minn. 1881); *U. S.* v. *Alexandria*, 19 F. 609 (C. C. Va. 1882); *U. S.* v. *Belknap*, 73 F. 19 (C. C. Cal. 1896).

American State cases. *Kemp* v. *Commonwealth*, 1 Hen. & Munf. 85 (Va. 1806); *Cheney* v. *Ringgold*, 2 Har. & Johns. 87, 94 (Md. 1807); *Stoughton* v. *Baker*, 4 Mass. 521 (1808); *Nimmo's Executor* v. *Commonwealth*, 4 Hen. & Munf. 57 (Va. 1809); *Commonwealth* v. *McGowan*, 7 Ky. 62 (1815); *Weatherhead* v. *Bledsoe*, 2 Overt. 352, 357 (Tenn. 1815); *People* v. *Gilbert*, 18 Johns. 227 (N. Y. 1820); *Bagley* v. *Wallace*, 16 Serg. & R. 245 (Pa. 1827); *State* v. *Arledge*, 2 Bail. 401 (S. Car. 1831); *Wilson* v. *Hudson*, 8 Yerg. 398, 411 (Tenn. 1835); *Commonwealth* v. *Miltenberger*, 7 Watts 450 (Pa. 1838); *Parks* v. *The State*, 7 Mo. 194 (1841); *U. S.* v. *White*, 2 Hill 59 (N. Y. 1841); *Swearingen* v. *U. S.*, 11 Gill. & J., 373, 377 (Md. 1841); *Parmilee* v. *McNutt*, 9 Miss. 179, 184 (1843); *McNamee* v. *U. S.*, 11 Ark. 148 (1850); *People* v. *Van Rensselaer*, 8 Barb. 189, 197 (N. Y. 1850); *State* v. *Fleming*, 19 Mo. 607, 609 (1854); *Inverson* v. *Dubose*, 27 Ala. 418 (1855); *Troutman* v. *May*, 33 Penn. State 455 (1859); *Cary* v. *Whitney*, 48 Me. 516 (1860); *State ex rel. Lott* v. *Brewer*, 64 Ala. 287, 296, 299 (1879); *Blazier* v. *Johnson*, 11 Neb. 404, 409 (1881); *Swan* v. *Lindsey*, 70 Ala. 507, 519 (1881); *State* v. *Sponaugle*, 45 W. Va. 415, 431 (1898); *State* v. *Halter*, 149 Ind. 292 (1897); *U. S.* v. *Brown*, 247 N. Y. 211 (1928).

England. *Magdalen College Case*, 11 Coke Rep. 66, 75-a (1616); *Lambert* v. *Taylor*, 4 B. & C. 138, 152 (1825); *Rustomjee* v. *The Queen*, L. R. 1 Q. B. D. 487, 492, 496 (1876); *Public Works Commissioners* v. *Pontypridd Masonic Hall Co.* [1920] 2 K. B. 233; *Administrator of Austrian Property* v. *Russian Bank for Foreign Trade* (1931) 48 T. L. R. 37; *Administrator of Hungarian Property* v. *Finegold*, 144 L. T. 670 (C. A. 1931).

Canada. *Humphrey* v. *The Queen*, 2 Can. Exch. 386, 390 (1891); *The Queen* v. *Black*, 6 Can. Exch. 236, 253 (1899).

plete absence of any authority extending the exemption to foreign sovereigns.

In fact, the State courts in exempting from their statute of limitations the United States as the paramount sovereign have felt obliged to explain that the United States shared the local sovereignty and did *not* stand in the shoes of a foreign state. In *Swearingen* v. *U. S.*, 11 Gill. & J. 373, 377 (1841), the Supreme Court of Maryland said:

> "All bonds etc., taken in the name of the King, etc., are expressly excepted; and the State succeeding to the rights of sovereignty, stood, at the Declaration of Independence, in the place of the King, and being thus expressly excepted, when she surrendered certain powers of sovereignty to the *United States*, the exception must be considered as applying to such newly created government, thus clothed with portions of her sovereign power. To all claims springing out of the exercise of every sovereign power by the State, and which were due to the State, by express legislation, the doctrine of *nullum tempus* etc., was applied, and when portions of this sovereign power have been conferred upon another government, and claims spring out of the legitimate exercise of such powers, such newly created government, to the extent of the granted power, must and ought to be considered as standing in the place and stead of the State so granting them; and if the State would have been excepted from the operation of the statute, upon all claims she might have, from the exercise of any power which now has been granted away, the *United States*, in the exercise of them, is but the substitute of the State, and is entitled to the benefit of the exception likewise. *This interpretation of the act does not enlarge the exception, for it is as before, confined to the sovereign power, which is now by our constitutions parcelled out to two governments.*"[1]

This decision was cited by the Arkansas court in support of the same conclusion that the United States is not barred

[1] Italics supplied in last sentence.

by the local statute of limitations. *McNamee* v. *U. S.*, 11 Ark. 148 (1850). Similarly, in refusing to extend the exemption to private parties for whose benefit the local sovereign sued, this Court in *U. S.* v. *Beebe*, 127 U. S. 338, 347 (1888), described the immunity of the sovereign from limitations as an

> "exemption of the Government designed for the protection of the rights of the United States alone."

Thus both the principle and the application of the rule of exemption from limitations are restricted to the local sovereign.

C. All the decisions in this country on the subject indicate, and some have held, that foreign sovereigns are bound by limitations.

1. The only American decisions or dicta directly on the applicability of the local rule of limitations to foreign sovereigns indicate that the foreign sovereign is bound. These are

> *Western Lunatic Asylum* v. *Miller*, 29 W. Va. 326 (1887);
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> *Commissioners of the Sinking Fund of Louisville* v. *Buckner*, 48 F. 533 (C. C. Ky. 1891);
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> *U. S.* v. *Brown*, 247 N. Y. 211 (1928);
>
> *Royal Italian Government* v. *International Committee of Y. M. C. A.*, 273 N. Y. 468 (1936).

Western Lunatic Asylum v. *Miller* was an action by a Virginia quasi-public corporation brought in 1878 against the receiver and other representatives of the committed person, then deceased, to recover a balance due on account of board, etc., for the period 1850-63. The receiver showed that

he had paid over the funds in his hands to the heirs of the deceased insane persons, and pleaded the statute of limitations. The Supreme Court of Appeals of West Virginia passed principally on that question. It first pointed out that there was doubt as to whether plaintiff corporation, unless part of the government of Virginia, could claim the benefit of the maxim *nullum tempus*. But the Court went on (p. 329):

> "But conceding as claimed by the plaintiff, that this corporation and the Commonwealth of Virginia are one and the same, and that it must be treated here as possessing all the attributes and immunities which belong to the sovereign Commonwealth of Virginia, still, when Virginia seeks redress and becomes a suitor in the courts of this State and beyond her territorial limits, she must lay aside her attributes and immunities of sovereignty and assert her demands as private individuals or corporations assert theirs in those courts, subject to the same laws and limitations. Sovereignty, though supreme within its own jurisdiction and territory, does not extend beyond these; and when a sovereign State enters the courts of a foreign State, she does so with no other rights and immunities than those which pertain to private corporations or individuals. (*Esley* v. *People*, 23 Kan. 512.) The *lex fori* governs in the limitation of actions. (*Johnson* v. *Anderson*, 76 Va. 766.)"

After disposing of a contention that the claim had been transferred by Virginia to West Virginia, the Court continued (p. 331):

> "But, if we treat the State of West Virginia as the plaintiff and owner of the claim, the statute began to run as to her April 1, 1869, and her right of action ceased and the bar of the statute became operative, in April, 1874, before the repeal of the statute barring claims due to the State. For these reasons, it seems to me plain that the plaintiff, when this suit was instituted, had no existing legal demand against the estate of Irby,

and that its bill should have been dismissed by the Circuit Court."[1]

Commissioners of the Sinking Fund of Louisville v. *Buckner* was an action on behalf of the City of Louisville under a special act of Congress to recover from the estate of a Collector of Internal Revenue taxes alleged to have been illegally assessed and collected from a railroad company of which the City was a stockholder. While in form against the Collector's estate the action was really against the United States. The taxes involved were collected in and before 1872, while the act permitting the action to be brought was approved in 1890. Defendants demurred to the petition. Judge Barr in the Circuit Court sustained the demurrer on two grounds, except as to the statute of limitations. With respect to that he held that the two-year statutory bar for this type of action had been lifted, so far as concerned the United States, by the special act. In discussing this point he dealt with the claim made on behalf of the plaintiffs that they represented a foreign sovereign immune from limitations (48 F. at 536):

> "But if this action was a common-law one, for money had and received, we think the bar of the statute of limitation would apply to the plaintiffs' action, if nothing else appeared. Assuming that the holding of stock in the Louisville & Nashville Railroad Company by the city of Louisville is not merely a private property right,

[1] The rest of the opinion is devoted to a discussion of the rights of the parties upon the basis of a stipulation in the record. In its brief opposing certiorari the United States endeavored to distinguish this case by the statement that the local statute there also barred the local sovereign. This fact is immaterial for two reasons. In the first place, it relates merely to an alternative contention of the defendants, not to that involving the claim of the foreign sovereign as to which the West Virginia court used the language above quoted. In the second place, the New York statute also applies to the local sovereign. Civil Practice Act §54 at page 93 below.

but is a public right, and is the exercise of governmental powers pertaining to sovereignty, the maxim, *nullum tempus occurrit regi,* is not applicable. This maxim is applied only to the sovereign or government that has enacted the limitation act. If foreign nations, subjects or citizens thereof, or municipalities deriving their power from a country other than that which has the act of limitation, seek the tribunals of the latter country, they are not entitled to apply this maxim, and will not be excepted from the limitation, unless the act of limitation excepts them in terms. The states of this Union, as between each other, or as between them and the United States, are not excepted from acts of limitation as to bringing suits, by the application of this maxim."

In *U. S.* v. *Brown,* the New York court held that an action by the United States to recover an overpayment made by it in 1918 upon a charter party executed for it by the United States Shipping Board Emergency Fleet Corporation was not barred by the statute of limitations. After stating the rule that the United States is not subject to limitations in an action to recover public moneys, the Court said (247 N. Y. at 218):

"It is not a case where the government, wishing a recovery only authorized by a State statute, seeks to avoid a condition upon which such recovery is permitted. Nor is it a case where another State or a foreign government comes to us for relief."

This is a clear intimation that in the opinion of the New York Court of Appeals a foreign government, coming to the New York courts for relief, would be barred by the New York statute of limitations.

In *Royal Italian Government* v. *International Committee of Young Men's Christian Associations* the New York Court of Appeals affirmed without opinion a decision of the Appel-

late Division for the First Department, also rendered without opinion, granting a motion by the defendant to dismiss the complaint in an action by the Royal Italian Government on the ground that the cause of action set forth did not accrue within the time limited by law for the commencement of an action. The transactions sued on were had in 1918 and 1919, and the action dismissed was not commenced until 1935. While it appears to be true that the claimed immunity of the foreign sovereign with respect to the New York statute of limitations was not asserted by it until motion for reargument in the Appellate Division, the contention was presented at that time, was rejected by the Appellate Division, and was presented to and rejected by the Court of Appeals.

These four cases contain the only discussion which we have been able to find in courts of English-speaking countries regarding the precise point here involved.[1] They indicate a clear line of decision supporting the District Court in accordance with the plain rationale and purpose of the rule of *nullum tempus,* and are in accord with the universal practice abroad as exemplified in *Gouvernement espagnol* v. *Veuve et heritiers d'Aguado,* Paris Court of Appeal (1867) Dalloz 1867 II 49 and other authorities.[2]

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[1] In *Cressey* v. *Meyer,* 138 U. S. 525 (1891) a creditor of the State of Louisiana sought to reach debtors of the State in a bill in the United States court. Louisiana intervened *pro interesse suo.* This Court held the action barred by limitation and laches. While holding that it was a personal action, it also intimated at page 528 that the suit would be treated in the federal courts as one by an individual against individuals even though in the courts of Louisiana the State might therein enforce all obligations due it regardless of the lapse of time. In other words, this Court, as an alternative ground of decision, held that the State of Louisiana appeared in the federal courts as a foreign sovereign subject to limitations.

[2] See Appendix II, pages 96-116 below.

2. The Circuit Court of Appeals, however, was influenced in the other direction (R. 283, 289; 91 F. [2d] at 899, 902) by a misinterpretation of a dictum announced by this Court in earlier cases. This dictum is the statement in *U. S.* v. *Nashville etc. R. Co.* (1886), 118 U. S. 120, 125, that the exemption of the United States from the statute of limitations when asserting rights as a sovereign government rests

> "upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided * * *."

From this Court's use of the words "applicable to all governments alike" it seems to have been thought that this Court intended to say that the public policy involved and the corresponding exemption from limitations apply to foreign sovereigns as well as to the domestic sovereign.

The error of any such belief is manifest upon tracing the language to its origin. The Court cited as authority for the language quoted

> *Fink* v. *O'Neil,* 106 U. S. 272, 281 (1882);
> *U. S.* v. *Thompson,* 98 U. S. 486, 490 (1878);
> *Gibson* v. *Chouteau,* 13 Wall. 92, 99 (1871);
> *U. S.* v. *Knight,* 14 Pet. 301, 315 (1840);
> *Lindsey* v. *Miller,* 6 Pet. 666, 673 (1832).

In all these cases except *Lindsey* v. *Miller* the phrase "applicable to all governments alike" in one form or another appears in the Court's statement of the rule *nullum tempus.* In two of them express reference is made, and in all of them the implied reference is, to the definitive discussion of Mr. Justice Story in *U. S.* v. *Hoar,* Fed. Cas. No. 15373 (1821) referred to at pp. 16-7 above. Mr. Justice Story, in show-

ing that the rule *nullum tempus,* while originating in the royal prerogative, was translated to the colonies and the States of America as in reality a doctrine of public policy, said:

> "And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments."[1]

In other words, the doctrine *nullum tempus* is one which the American States took over from the English common law because it is not a doctrine restricted to the monarchical system. There is no possibility of doubt that this is what Justice Story meant, and that this is all he meant, by the phrase "equally applicable to all governments" which, as repeated in the judgments of this Court, has been so signally misapplied in the instant case. In 1824 Mr. Justice Story wrote the opinion of this Court in *U. S.* v. *Kirkpatrick,* 9 Wheat. 720, in which he repeated that the maxim *nullum tempus* (p. 735)

> "is founded, not in the notion of extraordinary prerogative, but upon a great public policy."

In *Gibson* v. *Chouteau,* Mr. Justice Field first stated the principle in the English common law with reference to the King, then said that it "is applicable to all governments," and proceeded to hold that it is "upon this principle that in this country" the statutes of a State are restrictively construed.

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[1] The same reasoning is found in the New York court at about the same time. *People* v. *Gilbert* (N. Y. 1820), 13 Johns. 227; see also *People* v. *Van Rensselaer,* 8 Barb. 189, 197 (1850). So the North Carolina court speaks of "the principle of the common law that the sovereign cannot be estopped, as a rule of justice and policy, equally applicable to our institutions as to those of the mother country." *Candler* v. *Lunsford,* 20 N. Car. 407 (1839).

In *U. S.* v. *Thompson*, Mr. Justice Swayne, after tracing the principle *nullum tempus* in English law, said (p. 489):

> "When the colonies achieved their independence, each one took these prerogatives, which had belonged to the Crown; and when the national Constitution was adopted, they were imparted to the new government as incidents of the sovereignty thus created. It is an exception equally applicable to all governments. (*U. S.* v. *Hoar*, *supra*; *The People* v. *Gilbert*, 18 Johns. (N. Y.) 227 * * *."

In *Dollar Savings Bank* v. *U. S.*, 19 Wall. 227, 239 (1873), Mr. Justice Strong used a variation of the phrase which makes the point even clearer. He stated the principle that the King is not bound by an act of Parliament unless specifically named therein and added:

> "The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different states, and practically [particularly?] in the federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriae*, or universal trustee, enters as much into our political state as it does into the principles of the British Constitution."

From all these cases it is perfectly clear that this Court has consistently employed the phrase "applicable to all governments alike," in connection with its statement of the rule *nullum tempus*, as an historical justification for the translation to this country of a privilege anciently considered in England to be part of the royal prerogative (pp. 14-5 above).[1]

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[1] In recognition of the fact that they were dealing with a transplantation of the rule from a monarchical to a republican system, the courts have sometimes stated it as *nullum tempus occurrit reipublicae*. *Metropolitan R. Co.* v. *District of Columbia*, 132 U. S. 1, 12 (1889); *State* v. *Fleming*, 19 Mo. 607, 609 (1854); *Parks* v. *State*, 7 Mo. 194, 196 (1841).

This Court did not say, and did not intend to imply, that the maxim *nullum tempus* was applicable to a foreign sovereign as well as to the local sovereign. In fact all the cases just discussed (except only *Dollar Savings Bank* v. *U. S.*, which did not treat the question of limitations) held merely that the *local* sovereign is not barred by the statute of limitations. Mr. Justice Field, who in *Gibson* v. *Chouteau* used the phrase "applicable to all governments" in connection with the rule *nullum tempus*, wrote the opinion in *Indiana* v. *Kentucky*, 136 U. S. 479 (1890), in which he applied the doctrine of limitations in its positive form, i.e. in the form of acquisitive prescription, as against the State of Indiana. He there quoted with approval Vattel's language (p. 511):

> "Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title."[1]

If by the phrase "applicable to all governments", so frequently used, this Court had implied that the rule *nullum tempus* extended to all sovereigns in our courts, it would not have intimated the doubt which it did intimate (p. 18 above) when the French Republic claimed the benefit of the rule in the *Saratoga Vichy* case. The Circuit Court of Appeals in our submission misconceived the significance of the phrase and gave it undue weight in reversing Judge Caffey. The expression "applicable to all governments alike" originated in the tracing of the maxim *nullum tempus* to its source in the English common law, and must be limited by the circumstances in which it was used, according to the

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[1] Law of Nations Book 11 c. 11, §149. See the discussion below at pages 47-8 regarding the application of acquisitive prescription by this Court in litigation between States of the Union.

familiar rule of which this Court has often had occasion to remind counsel. *Taylor* v. *Voss*, 271 U. S. 176, 184 (1926).

3. Even as to the local sovereign, where the public policy underlying the rule *nullum tempus* really and properly applies, the tendency of decision and of legislation has been to limit the exemption from the statute of limitations.

In fourteen states of the Union, including New York, the local statute of limitations expressly provides that the State shall be barred thereby.[1] The Pennsylvania court, without a statute expressly barring the State and with recognition of the maxim *nullum tempus*, has nevertheless held that the presumption of payment from the lapse of time, as a rule of evidence affecting the burden of proof, binds the State. *In Re Ash's Estate*, 202 Pa. St. 422 (1902). The Court said of the presumption of payment:

> "It is of equitable origin, founded on experience of the ordinary course of business and human affairs, and adopted by the law in the interests of repose and the ending of litigation. There is no good reason why it should not apply to the Commonwealth just as other legal rules and presumptions do. And so it has been ruled."

This Court has in tax cases construed the rule *nullum tempus* strictly and against the local sovereign. *Bowers* v. *New York etc. Lighterage Co.*, 273 U. S. 346, 350 (1927). It has intimated the existence of exceptions to the rule even in the case of the local sovereign. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409 (1917); *United States* v.

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[1] These states are Georgia, Idaho, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, North Carolina, South Carolina, Vermont, Virginia, West Virginia. Note on the decision below in Yale Law Journal November 1937, Vol. 47, p. 132. The New York statute is set out at page 93 below.

Michigan, 190 U. S. 379, 405 (1903). The rule *nullum tempus* will not be applied in commercial transactions. *Cooke* v. *U. S.,* 91 U. S. 389, 398 (1875); *Wilber National Bank* v. *U. S.,* 294 U. S. 120, 124 (1935). Even against the local sovereign the presumption of a grant by lapse of time will be indulged. *U. S.* v. *Chaves,* 159 U. S. 452, 464 (1895). In analogous cases this Court has refused to enforce a claimed right of the United States as the paramount local sovereign in contradiction of a state law.

Fink v. *O'Neil,* 106 U. S. 272 (1882);
United States v. *Knight,* 14 Pet. 301 (1840);
Cf. *United States* v. *Harpootlian,* 24 F. (2d) 646 (C. C. A. 2d, 1928).

In *United States* v. *Knight,* the Court held that the liability on a bond given to the United States for the liberty of the jail yard in the State of Maine should be determined in accordance with the applicable state law, and that an Act of Congress to that effect bound the United States although it was not named therein. In so holding this Court adverted to the rule *nullum tempus,* discussed its basis of public policy, and said that an Act of Congress which did not divest the public of any right but makes provisions in accordance with the previous policy of conforming to state legislation, should be construed to apply to the United States even though it was not named therein. 14 Pet. at 315. The language of Mr. Justice Barbour on this point is quoted in *Fink* v. *O'Neil* in support of the holding that the statute of Wisconsin exempting homesteads for levy and sale upon execution bound the United States as a judgment creditor although it was not expressly named.

Citing this decision the Circuit Court of Appeals for the Second Circuit in *United States* v. *Harpootlian* held that the United States as judgment-creditor was subject to the statutory limitation imposed by the New York practice upon the right to examine in supplementary proceedings, not as a strict statute of limitations but as a condition precedent not complied with. The Court said (24 F. [2d] at 649):

> "The doctrine of governmental immunity in the statute of limitations does not apply, and when the time of lien lapsed, within the terms of its grant, the government is in the same position as a private litigant."

Another illustration of restrictive interpretation of the *nullum tempus* rule, even as to the local sovereign, is the line of cases holding that the rule will not be applied to agencies or grantees of the local sovereign, such as municipalities, county boards, school districts, and the like, at least where specifically governmental rights are not involved:

Metropolitan R. Co. v. *District of Columbia,* 132 U. S. 1 (1889);

Boone County v. *Burlington etc. R. Co.,* 139 U. S. 684, 693 (1891);

Douglas Co. v. *City of Lawrence,* 102 Kan. 656, 659 (1918);

May v. *School District,* 22 Neb. 205 (1887);

County of St. Charles v. *Powell,* 22 Mo. 525 (1856);

Gathright v. *State,* 129 Ark. 339 (1917).

In *Metropolitan R. Co.* v. *District of Columbia* this Court held that the District of Columbia is subject to the statute of limitations of Maryland, that it is not a department of the United States government entitled to the immunity of

the paramount sovereign, and that it is governed by the rules of procedure between private persons, despite the fact that the District of Columbia (p. 9)

> "is a separate political community in a certain sense, and in that sense may be called a state",

and despite the fact that the District had been held to be a state according to the definitions of writers on general law. *Hepburn* v. *Ellzey*, 2 Cranch 445 (1805).

D. The rule that a sovereign plaintiff must take the status of a private litigant involves submission of its claim to the local statute of limitations.

The conventional immunity of sovereigns has long been qualified by the rule that, upon invoking the jurisdiction of a municipal court, the sovereign doffs its immunity and takes the position of a private litigant.

> *United States* v. *The Thekla*, 266 U. S. 328, 340, 341 (1924);
> *United States* v. *Stinson*, 197 U. S. 200, 205 (1905);
> *The Davis*, 10 Wall. 15 (1869);
> *The Siren*, 7 Wall. 152, 159 (1868);
> *United States* v. *Moscow-Idaho Seed Co.*, 92 F. (2d) 170 (C. C. A. 9, 1937);
> *United States* v. *National City Bank*, 83 F. (2d) 236 (C. C. A. 2, 1936), certiorari denied 299 U. S. 563.

In all these cases, except the last, the sovereign involved was the sovereign of the forum, who has always in this country and in England received immunity from the defense of limitations under the rule *nullum tempus*. Yet even

against the United States this Court permitted a recovery upon a cross-claim in admiralty, saying by Mr. Justice Holmes (*U. S.* v. *The Thekla*, 266 U. S. at 339-40):

> "When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject-matter. The absence of legal liability in a case where, but for its sovereignty it would be liable, does not destroy the justice of the claim against it."

And at p. 341:

> "It is said that there is no statute by which the Government accepted this liability. It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act."

Quoting this language the Circuit Court of Appeals for the Ninth Circuit has held the United States as plaintiff in a negligence action to be subject to the ordinary defense of contributory negligence. *United States* v. *Moscow-Idaho Seed Co.*, 92 F. (2d) 170. The court said at pages 173, 174:

> "When the United States comes into court and institutes a suit for redress, not based on any infringement of its sovereignty and not for any violation of its governmental prerogatives, and submits a claim wholly in the nature of a private litigant, it, by implication, waives any immunity as sovereign and its adversary is entitled to set up any defense which would be available to him were his opponent another citizen instead of the government.
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> * * * * * * *
>
> The appellant having voluntarily selected the judicial forum wherein it has instituted a suit for damages to its Ford car arising out of an ordinary automobile collision has thereby consented that the court shall determine the matter in issue in accordance with the rules of law applicable to like controversies arising between private litigants."

Upon the principle thus enunciated and despite the well-settled rule of *nullum tempus* in favor of the local sovereign, the United States courts have on occasion held that even as to that sovereign the defense of laches and similar defenses apply. In *Hemmer* v. *United States*, 204 F. 898, 902 (C. C. A. 8, 1912) it was held that the United States was estopped in equity from repudiating representations made to certain grantees. At page 901 Judge Sanborn said:

> "This is a suit in equity. In such a suit the claims of the government appeal to the conscience of the chancellor with no greater or less force than those of a private individual under similar circumstances."

In *Walker* v. *United States*, 139 F. 409 (1905) the Alabama District Court held the United States to be estopped, saying upon a review of the English and American cases (p. 413):

> "The underlying principle of all the decisions is that, when the sovereign comes into court to assert a pecuniary demand against the citizen the court has authority, and is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum in like subject-matter between man and man."

In *United States* v. *Flint*, Fed. Cases No. 15,121 (C. C. Cal. 1876) a court of three judges sustained demurrers to suits in equity by the United States to set aside certain land patents. Fraud in the obtaining of the patents was alleged. The bills were filed eight years after issuance of the patents, nineteen years after final decree in proceedings brought by the claimants for possession of the lands. The court sustained demurrers to the suits. Mr. Justice Field, sitting as a Circuit Judge, said (25 Fed. Cas. pp. 1113-4):

> "The United States, by virtue of their sovereign character, may claim exemption from legal proceedings; but

when they enter the courts of the country as a litigant they waive this exemption, and stand on the same footing with private individuals * * *.

Although, on grounds of wise public policy, no statute of limitations runs against the United States, and no laches in bringing a suit can be imputed to them, yet the facility with which the truth could originally have been shown by them if different from the finding made; the changed condition of the parties and of the property from lapse of time; the difficulty, from this cause, of meeting objections which might, perhaps, at the time, have been readily explained; and the acquisition of interests by third parties upon faith of the decree, are elements which will always be considered by the court in determining whether it be equitable to grant the relief prayed. All the attendant circumstances of each case will be weighed, that no wrong be done to the citizen, though the government be the suitor against him.

* * * * * * *

Courts of equity will not entertain a suit to vacate a decree, even in case of palpable frauds, when there has been unnecessary delay in its institution, and the rights of third parties, as in this case, have intervened in reliance upon the decree. Considerations of public policy require prompt action in such cases, and if, by delay in acting, innocent parties have acquired interests, the courts will turn a deaf ear to the complaining party. This is the doctrine of equity, irrespective of any statute of limitations, and irrespective of the character of the suitor. It is essential that this doctrine should be vigorously upheld for the repose of titles and the security of property."

Now the emphasis laid by the courts upon the submission to the jurisdiction by a sovereign state as an assent to the rendition of justice between the parties, in all respects as if they were on an equal footing, is materially enhanced when the sovereign involved is a foreign state, not the local government, for the admission of foreign sovereigns as plaintiffs in municipal tribunals is entirely a matter of comity or

consent.[1] Originally the right of a foreign state to bring action in the English courts had been doubted. *Barclay* v. *Russell*, 3 Ves. Jr. 424 (1797). In the leading case of *Hullett* v. *King of Spain*, 2 Bligh N. S. 31 (1828) the right of the foreign sovereign to sue was put by the House of Lords in part upon the control which the forum would exercise over him as a suitor. At page 47:

> "That a King is entitled to sue as a King cannot be disputed. As a suitor he submits himself to the jurisdiction of the Court, otherwise it might be an objection that you could not control him. But if he comes here as a suitor, he submits himself to the jurisdiction. Has not the sovereign power of another country the common privilege of mankind?"

At page 57:

> "As to the objection that in the case of a sovereign justice cannot be done; if he appears as a Plaintiff, you can do complete justice—you can impose any terms you think proper—you have him in your power—you may file a crossbill, and then you have him completely under your control and jurisdiction."[2]

In the exercise of the control given to them by the submission to the jurisdiction of foreign states as plaintiffs, the courts have exacted terms in the interest of justice with respect to foreign sovereigns which have gone beyond those

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[1] *The Sapphire*, 11 Wall. 164, 167 (1870); *Russian S. F. S. Republic* v. *Cibrario*, 235 N. Y. 255, 262 (1923); *Republic of Honduras* v. *Soto*, 112 N. Y. 310, 311 (1889).

[2] In allowing a demurrer to a bill brought in the name of the Colombian Government with an insufficient description, Sir John Leach said:

> "A foreign State is as well entitled as any individual to the aid of this Court in the assertion of its rights: but it must sue in a form which makes it possible for this Court to do justice to the defendants. It must sue in the names of some public officers * * * who can be called upon to answer the cross-bill of the defendants."

Colombian Government v. *Rothschild* (1826) 1 Sim. 94.

exacted of the local sovereign. Thus foreign sovereign plaintiffs have been obliged to post security for costs, and to pay costs:

Republic of Honduras v. *Soto,* 112 N. Y. 310 (1889);
Emperor of Brazil v. *Robinson,* 5 Dowl. 522 (1837);
Otho, King of Greece v. *Wright,* 6 Dowl. 12 (1837);
The Beatrice, 36 L. J. Adm. 10 (1886);
Queen of Holland v. *Drukker* [1928] Ch. 877, 884.

In the *Drukker* case the Court said, in dismissing the action:

> "* * * as the sovereign State has submitted to jurisdiction by coming here I am in a position to order the sovereign State to pay the costs of the action."

In *Otho, King of Greece* v. *Wright,* the Court rejected the argument that the exaction of costs from a foreign sovereign would be an exercise of authority contrary to the comity of nations and to the courtesy displayed by independent sovereigns toward each other. At page 17 the Court said:

> "If a foreign prince sends over here to enforce his alleged rights in our courts, he must be subjected to the ordinary rules to which other suitors are liable, and more particularly in commercial dealings."

In *Republic of Honduras* v. *Soto,* the New York court pointed out that the Republic of Honduras, though a recognized foreign government, fell under the category of non-resident persons obliged to give security. In *Republic of Costa Rica* v. *Erlanger* (1875) L. R. 1 Ch. D. 171, 174, Blackburn, J., said that a foreign sovereign plaintiff "should, so far as the thing can be done, be put in the same position as a body corporate". To the same effect is *Republic of Peru* v. *Weguelin* (1875) LR 20 Eq. 140, 141.

In this respect a foreign state suing in the New York courts is in a position less privileged than the local sovereign. The local sovereign does not pay costs. *U. S.* v. *Verdier*, 164 U. S. 213, 219 (1896). Again the foreign sovereign has been held to be subject to discovery in equity as to all matters connected with any action instituted by the sovereign at law. In *Rothschild* v. *Queen of Portugal* (1839) 3 Y. & C. Ex. 594, 596, the Court said in allowing the discovery:

> "I am, therefore, of opinion that Her Most Faithful Majesty being a suitor voluntarily in a court of English law becomes subject, as to all matters connected with that suit, to the jurisdiction of this Court of Equity."

To the same effect are *United States* v. *Wagner* (1867) L. R. 2 Ch. App. 582, 592, 595; *Prioleau* v. *United States* (1866) L. R. 2 Eq. 659; *Land Oberoesterreich* v. *Gude*, 19 F. Supp. 78 (D. C. S. D. N. Y. 1937). And to his cross-bill against a foreign sovereign the defendant is entitled to have the sovereign answer under oath.[1] *King of Spain* v. *Hullett* (1833) 7 Bligh N. S. 359. Lord Brougham there said (p. 392):

> "A foreign sovereign is not sued here by a petition of right, nor does he sue by his attorney-general or government officer, but as a private individual. * * * The right of the King of Spain in respect of privilege in the courts of England, is not greater than that of any of his subjects. If he can bring his privilege with him, why may not his subjects also? One objects to answer upon oath; another may object to a trial by a jury of tradesmen. But if the king is recognized in the character of a suitor, must he not be content with the common fare of the court? * * * The more the question is

[1] Although from a respect to the dignity of the Crown the Court will not make the local sovereign answer upon oath. *Prioleau* v. *U. S.* (1866) L. R. 2 Eq. 659, 664.

> discussed the more clear it appears. The King of Spain sues here by his title of sovereign, and so he must be sued, if at all. But, beyond the mere name of sovereign, it has no effect. He brings with him no privileges which exempt him from the common fare of other suitors. The practice of the Court is part of the law of the Court."

So, where a foreign sovereign invoked the admiralty jurisdiction, he was obliged to give security for damages on a counterclaim. *The Newbattle* (1885) L. R. 10 P. D. 33. Brett, M. R., said at page 35, distinguishing *The Parlement Belge*, L. R. 5 P. D. 197 (1880):

> "It has always, however, been held that if a sovereign prince invokes the jurisdiction of the Court as a plaintiff, the Court can make all proper orders against him. The Court has never hesitated to exercise its powers against a foreign government to this extent."

Similarly this Court has held a foreign sovereign liable in admiralty to the reduction of its claim by application of the rule of limited liability. *The Scotland*, 105 U. S. 24, 31 (1881).

The scope and extent of the requirement of submission to the jurisdiction exacted of the foreign sovereign is well indicated by language used by James, L. J., in passing in *Strousberg* v. *Republic of Costa Rica*, 44 L. T. 198, 201 (C. A. 1881):

> "There is, in my opinion, but one exception, if it can be called an exception, to that rule, namely, that where a foreign sovereign or state comes into the municipal courts of this country for the purpose of obtaining a remedy; then, by way of defence to that proceeding—by way of counter-claim if necessary to the extent of defeating that claim—the person sued here may file a cross-claim, or take any other proceeding against that sovereign state for the purpose of enabling complete justice to be done between them. That is what was done in all those cases of the United States and others, and

> that is to my mind, the only instance in which anything in the nature of process against a foreign sovereign can issue, or is allowable. In that case *it really is not process against the foreign sovereign, but it is a mere matter of course,* for the defendant there is, in fact, merely giving to the foreign sovereign's attorney or solicitor notice of the proceedings—for that is, in substance, what it comes to—*so as to bring in whatever defence there might be,* or whatever counter-claim there might be, as a set-off."[1]

Manifestly the defense of the statute of limitations is comprised within this language. The exemption of the local sovereign from such defense is not an indication to the contrary. It is obvious, for instance, that in equity the claim of a foreign sovereign (whether maintained by itself or by an assignee) would be subject to the usual rules of estoppel. Even the local sovereign has on occasion (pp. 37-8 above) been held subject to estoppel. Yet more frequently he has been protected against estoppel by the rule *nullum tempus.* See *Candler* v. *Lunsford,* 20 N. Car. 407, 408 (1839); *People* v. *Brown,* 67 Ill. 435, 438 (1873); *The Queen* v. *Black,* 6 Can. Exch. 236, 253 (1899); *Humphrey* v. *The Queen,* 2 Can Exch. 386, 390 (1891). These courts put the doctrine of exemption of the local sovereign from estoppel upon the same basis as its exemption from limitations. Thus the Illinois court says:

> "As between the government and an individual, we have found no case holding the former would be estopped by any statement of its officials from recovering its own.
>
> "It is a familiar doctrine, that the State is not embraced within the Statute of Limitations, unless specially named, and, by analogy, would not fall within the doctrine of estoppel. Its rights, revenues and property would be at fearful hazard, should this doctrine be applicable to a State. A great and overshadowing public

[1] Italics supplied.

> policy of preserving these rights, revenues and property from injury and loss by the negligence of public officers, forbids the application of the doctrine."

While this result may be consecrated by the maxim *nullum tempus occurrit regi* as concerns the local sovereign, it could not for a moment be permitted for a foreign sovereign plaintiff within the rules elsewhere stated by the Circuit Court of Appeals of the Second Circuit itself:[1]

> "The Supreme Court has held, independently of any statute, that, where the sovereign brings a suit, it submits to the application of the same principles which govern private suitors. * * * Where a sovereign voluntarily litigates, he must play the role of a litigant like any other suitor and abide by the consequences. * * * When a sovereign sues, it may not expect a preferred status, for its suit is determined according to the rules applicable to private suitors in like cases."

If upon such principles a foreign sovereign plaintiff is subject to the law of estoppel, why is he not subject to the analogous principles of laches, limitation, and prescription, notwithstanding the usual exemption of the local sovereign in that regard? In the obligation to "comply with our substantive law and our procedure",[2] must not the plaintiff state accept the statute of limitations as part of the common fare of the court? We answer that the foreign plaintiff is assuredly bound to do so, for the reason that the principle of limitations and prescription as fixed in the procedure of the forum has long been recognized to be essential in the administration of justice.

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[1] *United States* v. *National City Bank*, 83 F. (2d) 236, 238, 239 (C. C. A. 2, 1936) cert. den. 299 U. S. 563.

[2] Mayer, D. J., in *The Jane Palmer*, 270 F. 609, 612 (S. D. N. Y. 1920).

E. The statute of limitations has long been recognized as a meritorious defense essential in the administration of justice.

The policy of limitations and prescription is one of the oldest in the law. Acquisitive prescription and the limitation of actions were both known in Roman law.[1] The New York statute is strictly one of limitations, abrogating the remedy without impairing the right.[2] It was first enacted in 1788, the provision in the present Civil Practice Act dating back to the original Code of 1848.[3] The comparable English statute was the Limitation Act, 1623, 21 Jac. 1, c. 16. This was, of course, the law of New York during the Colonial period.

In *Green* v. *Rivett*, 2 Salk. 421 (1702) the Court of King's Bench said:

> "* * * the statute of limitations, on which the security of all men depends, is to be favoured."

This has been the view of the New York courts. In *Brooklyn Bank* v. *Barnaby*, 197 N. Y. 210, 227 (1910) the Court said:

> "At common law a right of action which had once accrued was immortal. Experience long ago demonstrated the unwisdom of such a rule. Practical considerations applied to the administration of justice demanded that legal disputes should be settled while evidence was readily obtainable."

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[1] Gaius, Institutes, Book ii Section 61 (usucapio), Book iv Section 110 (limitations), about A. D. 150; Justinian, Institutes, Book II Tit. vi, Book IV Tit. xii, about A. D. 533.

[2] *Lightfoot* v. *Davis*, 198 N. Y. 261, 264 (1910).

[3] Act of February 26, 1788, Section X, Laws of New York, 11th Session, Cap. XLIII; Code of 1848, §91, Laws of New York 1848, 71st Session, Chap. 379.

In *Schmidt* v. *Merchants Despatch Transportation Co.*, 270 N. Y. 287, 302 (1936) Lehman J. pointed out:

> "The statute of limitations is a statute of repose. At times, it may bar the assertion of a just claim. Then its application causes hardship. The Legislature has found that such occasional hardship is outweighed by the advantage of outlawing stale claims."

This Court recognizes the defense of limitations to be one resting upon sound policy and tending to the peace and welfare of society. *M'Cluny* v. *Silliman*, 3 Pet. 270, 278 (1830). In holding an action barred under the law of Kentucky as against a claim of revival by acknowledgment, Mr. Justice Story said in *Bell* v. *Morrison*, 1 Pet. 351, 360 (1828):

> "It has often been matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavourable light, as an unjust and discreditable defence, it had received such support, as would have made it, what it was intended to be, emphatically, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands, after the true state of the transactions may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlement of accounts, and to suppress those prejudices which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them."

This view of the policy of limitations and prescription has been constantly reiterated in this Court. In *Campbell* v. *Haverhill*, 155 U. S. 610, 617 (1895), the Court said in sustaining the statute of limitations of Massachusetts to an action at law for the infringement of a patent:

> "Whatever prejudice there may have been in ancient times against statutes of limitations, it is a cardinal principle of modern law and of this court, that they are to be treated as statutes of repose, and are not to be construed so as to defeat their obvious intent to secure the prompt enforcement of claims during the lives of the witnesses, and when their recollection may be presumed to be still unimpaired."

In *United States* v. *Oregon Lumber Co.*, 260 U. S. 290, (1922), this Court on an extensive review of the authorities held that the defense of limitations is not a technical defense but substantial and meritorious, quoting in particular *Wood* v. *Carpenter*, 101 U. S. 135, 139 (1879) and *Riddlesbarger* v. *Hartford Insurance Co.*, 7 Wall. 386, 390 (1868).[1]

For this reason this Court has in a series of cases affecting boundaries between states of the Union applied the principles of prescription even in the absence of positive statutory direction. See

> *Rhode Island* v. *Massachusetts*, 4 How. 591, 639 (1846);
> *Indiana* v. *Kentucky*, 136 U. S. 479, 510 (1890);
> *Louisiana* v. *Mississippi*, 202 U. S. 1, 53 (1906);
> *Maryland* v. *West Virginia*, 217 U. S. 1, 42 (1910);
> *Michigan* v. *Wisconsin*, 270 U. S. 295, 308 (1926).

In these cases, of course, the lapse of time was much greater than that prescribed in the ordinary municipal statute of limitations. Yet the principle invoked by this Court is the same. In *Rhode Island* v. *Massachusetts* Mr. Justice M'Lean said:

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[1] See to the same effect Wood on Limitation of Actions (4th Ed. 1916) §4; Borchard Diplomatic Protection of Citizens Abroad §384; 3 Wharton International Law Digest (2nd Ed.) 972 §239 Appendix.

> "No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary."

While it is true that the states of the Union are not nations either as among themselves or as against foreign nations,[1] nevertheless the principles involved in the application by this Court of acquisitive prescription to suits between them are true principles of international law. As was pointed out in *Michigan* v. *Wisconsin*, 270 U. S. at 308, prescription runs against a full sovereign. And this principle has been fully recognized by international tribunals generally, applying the considerations stated by this Court in the boundary cases. Illustrations are the opinion of the Greco-Bulgarian Mixed Arbitral Tribunal in *Sarropoulos* v. *Etat bulgare* (1927), 7 Recueil T. A. M. 47, 51; the language of the United States-Venezuela Arbitration Commission in the *Spader* case (1903), Ven. Arb. of 1903, 161, Ralston, Law and Procedure of International Tribunals (1926) p. 378; the language of the same Commission in the *Gentini* case, Ven. Arb. of 1903, 720, Ralston, p. 378; the decision of the United States-Venezuela Commission of 1885 in the *Cadiz* case, 4 Moore Int. Arb. p. 4199; the decision of the same Commission in the *Williams* case, 4 Moore Int. Arb. p. 4181; and the decision of Sir Edward Thornton as Umpire of the Mexican-American Claims Commission of 1868 in the *Mossman* case, 4 Moore Int. Arb. p. 4180.

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[1] *New Hampshire* v. *Louisiana*, 108 U. S. 76, 90 (1883).

Of these cases, perhaps the *Williams* case contains the most thorough consideration of the principle of prescription of international claims even between sovereign states and without express provision therefor in the procedural code of the forum. The Commission concluded that as a matter of principle the lapse of about twenty years should bar a claim in international law, and dismissed a claim presented on behalf of the United States against Venezuela twenty-six years after its accrual. In *Sarropoulos* v. *Etat bulgare*, the Greco-Bulgarian Mixed Arbitral Tribunal declared:

> "Prescription, an integral and necessary part of every system of law, is entitled to be received in international law."

The United States-Venezuela Commission of 1885 in the *Cadiz* case pointed out, in rejecting a stale claim (4 Moore Int. Arb. at p. 4203):

> "It is true that this Commission is an international tribunal and in some sense is not fettered by the narrow rules and strict procedures obtaining in municipal courts, but *there are certain principles, having their origin in public policy, founded in the nature and necessity of things, which are equally obligatory upon every tribunal seeking to administer justice.*"[1]

There are of course apparent exceptions to this general rule. Such are the two cases cited by Judge Manton in his concurring opinion.[2] In *Collac* v. *Yugoslav State*, Ann. Dig. 1929-30, 9 Recueil T. A. M. 195 (1929), the Yugoslav-Hunga-

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[1] Italics supplied. See also the language of Professor Borchard, *The Diplomatic Protection of Citizens Abroad* (1922) page 826; Rules of Prescription adopted by Institute of International Law, Annuaire (1925) page 558, 18 A. J. I. L. 760; Ralston, *Law and Procedure of International Tribunals* (1926) Ch. 13.

[2] R. 291; 91 F. (2d) at 903.

rian Mixed Arbitral Tribunal held merely that the four-year statute of limitations in the municipal law of Yugoslavia did not apply to a proceeding under the Treaty of the Trianon in view of the fact that Article 239 of that Treaty authorized the tribunal to establish its own procedure and in view of the fact that, acting thereunder, the tribunal had allowed until December 31, 1925, for the filing of claims. The claim in question was filed on December 2, 1925. Obviously this decision has nothing to do with the principle under discussion. In the *George W. Cook* case, Ann. Dig. 1927-8, No. 174, Ralston, Supplement to the Law and Procedure of International Tribunals (1936), p. 185, the Mexican-American Claims Commission of 1927, said that there is no rule of international law putting a limitation of time on diplomatic action or upon the presentation of an international claim to an international tribunal. The holding, however, was merely that the municipal statute of limitations of Mexico did not relieve it from liability to the United States in international law. The Commission forbore to lay down a general rule, saying:

> "It has sometimes been said that statutes of prescription are not a bar to international reclamations. General statements of this kind have perhaps at times led to some confusion of domestic law with a well recognized principle of international practice."

H. Lauterpacht remarks in *Private Law Sources and Analogies of International Law* (1927), pages 118-9:

> "While the field of application of acquisitive prescription is naturally a limited one, extinctive prescription, corresponding to limitation of actions in municipal law, is becoming of ever-growing importance in international arbitration. * * * Where international tribunals refuse to recognize the plea of prescription, the refusal can, as a rule, be traced to the special circumstances of the particular case."

Because in the nature of things international tribunals are subject to no *legislative* direction as to a period of limitations or prescription, and because the submission to international arbitration never provides for a bar on account of the lapse of time but has in fact been construed to waive prescription,[1] the continuous trend of authority even in those tribunals to the effect that claims of a sovereign state must be barred on account of staleness is a cogent indication of the wisdom and justice of the principle of limitations involved in this action.

F. Allowance of the Defense of Limitations against a Foreign Sovereign's Claim is no Impairment of its Immunity as Heretofore Understood.

The decision of the Circuit Court of Appeals seems to have been placed upon three grounds. One was the erroneous interpretation already discussed (pp. 28-32 above) of the phrase "applicable to all governments alike". The second was that Court's understanding of *U. S.* v. *Belmont*, 301 U. S. 324, discussed below at pages 83-7. The third was the concept of sovereign immunity. Judge Swan thought that to refuse to apply the rule *nullum tempus* to a foreign sovereign would be to accord to it less than full sovereign rights (R. 284, 91 F. [2d] at 900). Judge Manton based his whole opinion upon the principle of sovereign immunity enunciated in *The Schooner Exchange* v. *M'Faddon* (1812) 7 Cranch 116 and *The Parlement Belge* (1880) L. R. 5 P. D. 197.

[1] Thus in *The Pious Fund of the Californias*, For. Rel. 1902, App. II, page 63, the brief of the United States argued that Mexico's execution of the submission to arbitration was a waiver of the defense of limitations; and the tribunal in effect so held (Ibid. p. 17).

It seems to us that the irrelevance of the concept of sovereign immunity to the point here under discussion is easily demonstrated.

1. As has already been shown (pp. 35-43 above), the foreign sovereign's claim, when submitted to a municipal forum, must take the common fare of the Court and must be subjected to all the principles of law requisite to do justice between private citizens. The principle involved is one of waiver of the sovereign's immunity. See, for example, *United States* v. *The Thekla*, quoted at page 36 above.

Judge Manton's opinion does not deal at all with the possibility of waiver. Judge Swan, however, says that the submission of the foreign sovereign is a matter pertaining to procedure after the sovereign has sought the aid of the court, while the effort here is to charge the sovereign with the responsibility for something which occurred before he sought the aid of the court (R. 284, 91 F. [2d] at 900).

The distinction suggested is, we submit with respect, an impossible one and wholly inconsistent with the principle of waiver by submission to the jurisdiction. It would apply as well to the defense of contributory negligence or to a cross-claim for damages, both of which relate to matters occurring before the sovereign invoked the aid of the local court, yet matters in respect of which it is held that the sovereign must submit to adjudication in connection with his own claim.[1] On the other hand, allowance of the defense of limitations is, even more peculiarly than set-off or counterclaim or the defense of contributory negligence, a matter

[1] *United States* v. *Moscow-Idaho Seed Co.*, 92 F. (2d) 170 (C. C. A. 9, 1937); *United States* v. *The Thekla*, 266 U. S. 328 (1924); *The Newbattle* (1885) L. R. 10 P. D. 33.

pertaining to procedure after the sovereign has sought the aid of the court.[1] The New York statute of limitations is found in the State code of procedure. It is well understood that this statute operates upon the remedy only, not upon the right.[2] To grant judgment against the foreign sovereign's claim on the ground of the statute of limitations of the forum is therefore precisely to subject the foreign sovereign to the procedure of the forum after he[3] has invoked its aid and to apply to him upon the same footing as any private litigant the rules determined, and rightly determined, by the forum to be essential in the administration of justice. The bar of limitations is that very practice of the court, which Lord Brougham said was part of the law of the court. *King of Spain* v. *Hullett*, 7 Bligh N. S. 359, 393, quoted at pages 41-2 above. When by the institution of an action thereon the claim of the foreign sovereign is submitted to a municipal court, the waiver of the sovereign's immunity with respect to all matters connected with that cause of action, at whatever time occurring, is complete. To whatever defense any of those matters might give rise as against a private litigant, to that defense the defendant is entitled against the foreign sovereign's claim.

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[1] Judge Swan's opinion justifies the allowance of set-off or counterclaim against a foreign sovereign as was done in *United States* v. *National City Bank*, 83 F. (2d) 236, certiorari denied 299 U. S. 563, on the ground that "that is a matter pertaining to procedure after the sovereign has sought the aid of the court". R. 284; 91 F. (2d) at 900.

[2] *Lightfoot* v. *Davis*, 198 N. Y. 261, 264 (1910); *Campbell* v. *Holt*, 115 U. S. 620, 626 (1885); *Campbell* v. *Haverhill*, 155 U. S. 610, 618 (1894).

[3] Or (as in this case) the assignee of the foreign sovereign. The assignee can stand in no better place than the foreign sovereign itself, as the Circuit Court of Appeals recognized in the case of another claim assigned by the State of Russia. *United States* v. *National City Bank*, 83 F. (2d) 236, 239, certiorari denied 299 U. S. 563. See also *United States* v. *President etc. of the Manhattan Co.*, 276 N. Y. 396, 406-7 (1938); *U. S. Belmont*, 301 U. S. 324, 335 (1937).

2. The application of limitations to the foreign sovereign's claim does not go so far as some of the consequences of his submission to the jurisdiction which are firmly established. The allowance of a set-off or counterclaim, for example, not only takes the sovereign's property but may result in an affirmative judgment against him.[1] The statute of limitations technically takes no property. It affects the remedy only.[2] Hence, as a formal matter, the foreign sovereign is not by a successful plea of limitations injured in his property at all, but is merely deprived of a remedy of the municipal courts which had theretofore been open to him and which is withdrawn after the lapse of the statutory period because of the inequitable burden placed upon the defendant by his delay. The liberty to avail of that remedy is not in itself a property right or title in the foreign sovereign. The right of action of a foreign sovereign has been described by this Court as a privilege based on comity and friendly feeling (*The Sapphire* [1870] 11 Wall. 164, 167) and with respect to it the New York Court has said:

> "It may, however, not be demanded as a right. It is yielded as a favor. * * * We reach the conclusion, therefore, that a foreign power brings an action in our courts not as a matter of right. Its power to do so is the creature of comity."
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> *Russian S. F. S. Republic* v. *Cibrario*, 235 N. Y. 255, 259, 262 (1923).

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[1] *U. S.* v. *The Thekla*, 266 U. S. 328 (1924); *U. S.* v. *Paquete Habana*, 189 U. S. 453, 465 (1903); *U. S.* v. *The Nuestra Señora de Regla*, 108 U. S. 92, 102 (1882).

[2] See cases cited at note 2 on page 58 above.

The fact that, as is pointed out by Judge Manton,[1] the foreign sovereign cannot be compelled to sue, any more than he can be compelled to submit to suit, is in our respectful submission wholly immaterial. It is quite wrong, in our submission, to argue that, because there is no law requiring the ambassador to sue, the statute of limitations cannot be invoked against him. There is no necessary connection at all between these propositions. Even a private litigant cannot be compelled to sue, though he may be subjected to suit. The running of the statute of limitations against the claim of a private litigant is predicated, not upon any right of compulsion with respect to him, but upon *the accrual of a cause of action.* New York Civil Practice Act §48, page 92 below. The cause of action of a foreign sovereign accrues in the same manner and upon the same facts as any other cause of action. There is no mystical quality in the immunity of the sovereign which differentiates his cause of action in respect of accrual. Under the New York statute, it accrued either upon demand or (in the absence of demand) then upon notice to him of the debtor's repudiation of liability.

The Circuit Court of Appeals for the Second Circuit itself took, in 1927, the position taken in this brief with respect to Mr. Ughet's duty to sue. In *Lehigh Valley R. Co.* v. *State of Russia,* 21 F. (2d) 396, 400, certiorari denied 275 U. S. 571, Judge Manton said with respect to Mr. Ughet's continuation of the actions instituted against Lehigh Valley Railway Company by Mr. Bakhmeteff as Ambassador in 1918:

> "This duty became obvious. It became important to avoid efforts to destroy the right of action as a basis

[1] R. 290, 91 F. (2d) at 903, citing *Musurus Bey* v. *Gadban* [1894] 2 Q. B. 352. This case held merely that, since a foreign ambassador is immune from suit, the statute of limitations does not run *in his favor* and against his creditors during the period of immunity.

> of keeping its property, when motions to dismiss were made and *delays occurred which would give rise to the bar of limitation to sue.*"[1]

In the instant case the facts which gave rise to a cause of action occurred in 1918-20. The New York statute says:

> "Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete, except in one of the following cases * * *"[2]

The exception was negatived by petitioner's repudiation. In the *Tillman* case the New York Court of Appeals said (253 N. Y. at 297):

> "By failure to make a demand which is unnecessary, a depositor cannot prevent the period of limitation from running against a cause of action which he is entitled to maintain without demand."

There is nothing in the position of a foreign sovereign in this country which entitles him to carry on commercial dealings with American nationals free of such requirements as these. The opinions of the Circuit Court of Appeals confer upon the foreign sovereign with respect to his transactions here a new status of untouchability. Mention is made of his extra-territorial privileges with respect to property (R. 289, 91 F. [2d] at 902), as if the debt of the New York bank to him enjoyed extra-territoriality. Mention is made of diplomatic means as the only recourse available to the claimant against a foreign sovereign (R. 288, 91 F. [2d] at 902). Similar considerations were indulged by the same court in

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[1] Italics supplied. The bar of limitations so referred to was a two-year restriction incorporated in the bills of lading. *Russian Government* v. *Lehigh Valley R. Co.*, 293 F. 133 (D. C. S. D. N. Y. 1919).

[2] Civil Practice Act §15, page 92 below.

The Navemar, 90 F. (2d) 673, where Judge Manton's opinion held that the suggestions of the Spanish Ambassador as to his Government's title to the ship must be accepted as conclusive, and that they could be examined, if mistaken, only through diplomatic channels. This decision was reversed by this Court on January 31, 1938.[1] This Court held that the suggestion of the Spanish Ambassador was not conclusive, and that the jurisdiction of the admiralty court over the ship was a proper subject for inquiry upon proof of the matters alleged.

The principle applicable here, with reference to the claim of the foreign sovereign as brought into court by its assignee, is that stated by Judge Mack in *The Gloria*, 286 F. 188, 193 (D. C. S. D. N. Y. 1923)[2] and by this Court in *U. S.* v. *The Thekla*, 266 U. S. 328 (quoted at p. 36 above), and that expressed by A. S. de Bustamante[3] in his *Derecho Internacional Privado* (Havana 1931) Vol. 3, §1671:

> "The principle [of sovereign immunity] is incompetence, only modified when the foreign State, submits voluntarily to local justice, or when it acts in form and with a private character thereby divesting itself of its privileges and prerogatives. * * * In other words, when the foreign State may be judged by us, the fundamental rules of our jurisdiction in civil and mercantile causes are not altered thereby. These rules are maintained intact, merely permitting that said State may be, within them, one of the litigants."

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[1] *Compania Española de Navegacion Maritima S. A.* v. *SS. Navemar*, No. 242, not yet officially reported.

[2] Judge Mack said at page 194:

> "There is no principle of public law exempting a sovereign state from its obligations under the law. * * * But, once the state has chosen its forum, there seems little reason in law or policy why it should not be subject to the substantive requirements of law and justice."

[3] Judge of the Permanent Court of International Justice and author of the Pan-American Code of Private International Law (p. 99 below).

The immunity of the public property of a foreign sovereign from the compulsion of judicial process, as delimited in *The Schooner Exchange* v. *M'Faddon* (1812) 7 Cranch 116, and *The Parlement Belge*, L. R. 5 P. D. 197 (1880), is not here involved at all. That immunity is constructed on the theory of an implied consent by the local sovereign "to waive its jurisdiction", founded upon its exclusive control of its own territory, over the property of a foreign sovereign here under license.[1] The running of the statute of limitations against a foreign sovereign's claim when submitted to the municipal courts is, however, predicated upon the reverse theory of *waiver of its immunity*. It is clear that the two theories are not in conflict and that the decision below can be regarded only as an unwarranted extension of the existing concept of sovereign immunity.[2]

3. Judge Swan stated that to refuse a foreign sovereign the benefit of the rule *nullum tempus* would be to accord to it "less than full sovereign rights" (R. 284, 91 F. [2d] at 900). It already appears, in the light of the requirement of submission by the foreign sovereign to the rules of the forum (pp. 35-44 above), that the application to his case of a statutory rule of limitations does not diminish the immunity to which he is entitled. But in any event it is untrue to say that a foreign sovereign is entitled, upon the territory of the local sovereign, to "full sovereign rights". The penal and revenue laws of a foreign sovereign, for example, will not be enforced here.[3] A foreign sovereign,

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[1] Marshall, C. J., 7 Cranch at page 146.

[2] See note in Yale Law Journal November 1937, Vol. 47 at page 135: "The rule in the instant case extends sovereign immunities into a field where they serve no useful purpose but defeat an underlying policy of another sovereign government."

[3] *State of Wisconsin* v. *Pelican Insurance Co.* (1888), 127 U. S. 265; *The Antelope* (1825), 10 Wheat. 66; *Queen of Holland* v. *Drukker* [1928] Ch. 877.

of course, cannot levy troops or exercise eminent domain here. The foreign sovereign may be compelled to give security for damages on a counterclaim (p. 42 above), while the local sovereign may not. The foreign sovereign may be compelled to answer under oath, while the local sovereign may not (p. 41 above). The foreign sovereign must pay costs, while the local sovereign is exempt from that necessity (pp. 40-1 above). The local sovereign by virtue of his prerogative has priority over all citizens for the payment of debts due it out of a debtor's property[1], while we should not suppose it would be urged that the State of Russia was entitled to this privilege.

All of the powers and privileges enumerated are of the essence of "full sovereign rights" and inhere in the local sovereign by virtue of his prerogative just as does the right to exemption from limitations. Yet it has never heretofore been held that the foreign sovereign is impaired in his immunities or deprived of the comity due him because he is not admitted to the enjoyment of like powers and privileges.

A foreign sovereign appears here in his private, not his sovereign, capacity. In *Georgia* v. *Chattanooga* (1924), 264 U. S. 472, this Court held that the acquisition by the State of Georgia of land for railway purposes in the State of Tennessee, with the consent of the latter, did not subtract from the sovereign power of Tennessee or of the City of Chattanooga as its grantee to take that land by eminent domain for highway purposes. This Court said (p. 480):

> "Land acquired by one State in another State is held subject to the laws of the latter and to all the incidents of private ownership. The proprietary right of the owning State does not restrict or modify the power of

[1] *Marshall* v. *New York*, 254 U. S. 380, 382 (1920); *U. S.* v. *State Bank of North Carolina*, 6 Pet. 29, 34 (1832).

eminent domain of the State wherein the land is situated. See *Burbank* v. *Fay*, 65 N. Y. 57, 62; *United States* v. *Railroad Bridge Co.*, 6 McLean 517, 533; *United States* v. *Chicago*, 7 How. 185, 194. Tennessee by giving Georgia permission to construct a line of railroad from the state boundary to Chattanooga did not surrender any of its territory or give up any of its governmental power over the right of way and other lands to be acquired by Georgia for railroad purposes. The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation authorized to own and operate a railroad; and, as to that property, it cannot claim sovereign privilege or immunity. *Bank of the United States* v. *Planters' Bank*, 9 Wheat. 904, 907; *Bank of Kentucky* v. *Wister*, 2 Pet. 318, 323; *Louisville, C. & C. R. R. Co.* v. *Letson*, 2 How. 497, 550; *South Carolina* v. *United States*, 199 U. S. 437, 463. Undoubtedly Tennessee has power to open roads and streets across the railroad land owned by Georgia."

So Lord Brougham said in *King of Spain* v. *Hullett* (1833), 7 Bligh N. S. 359, 393:

> "The King of Spain sues here by his title of sovereign, and so he must be sued, if at all. But, beyond the mere name of sovereign, it has no effect. He brings with him no privileges which exempt him from the common fare of other suitors."

Similarly Lord Justice Blackburn indicated that the foreign sovereign plaintiff should, so far as possible, be put in the same position as a body corporate, and the New York court treated the foreign sovereign plaintiff as a "person" residing outside the jurisdiction.[1]

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[1] *Republic of Costa Rica* v. *Erlanger* (1875), 1 Ch. D. 171, 174; *Republic of Honduras* v. *Soto*, 112 N. Y. 310 (1889). In *Republic of Peru* v. *Weguelin* (1875) L. R. 20 Eq. 140, 141-2, the Vice-Chancellor said:

> "The case of a foreign government is the same as that of a corporation, and the ordinary practice applicable to a corporation must be adapted, as well as it will admit, to the case of a foreign government, whether it be a republic or a sovereignty."

In *Prioleau* v. *U. S.* (1866) L. R. 2 Eq. 659, 663, the Vice-Chancellor said with respect to a foreign sovereign plaintiff:

> "Where the suitor is an individual, although he may be the sovereign of a foreign country and may of himself in reality represent the whole country of which he is sovereign, this Court has refused to acknowledge him when he comes here as a suitor in any other capacity than as a private individual."

That case was a cross-bill to a suit brought by the United States to recover proceeds of cotton consigned to the defendants by the Confederate Government. Adverting to the fact that the United States was a corporate sovereign not represented in court by any individual amenable to discovery, the Vice-Chancellor continued (p. 665):

> "Is there any reason why the Defendant in the original suit should be deprived of those privileges which are enjoyed by every other party to a suit, or why either he or the government suing here should not be dealt with according to the rules by which all other individuals, including the sovereign of any other state, must be dealt with when they seek to obtain relief in this Court? It appears to me there is no sound ground for saying that the rule is not to be applied."

These decisions make plain the fallacy involved in the Circuit Court of Appeals' use of "full sovereign rights" as a criterion for the application of the statute of limitations to the State of Russia in this forum. No foreign sovereign has the same measure of rights in the territory of the local sovereign as does the local sovereign. The reason is apparent from Mr. Justice Holmes' explanation of sovereign immunity in *Kawananakoa* v. *Polyblank* (1907), 205 U. S. 349, 353:

> "Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without

its own permission, but the answer has been public property since before the days of Hobbes. (Leviathan, c. 26, 2.) A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. *'Car on peut bien recevoir loy d'autruy, mais il est impossible par nature de se donner loy.'* Bodin, Republique, 1 c. 8, Ed. 1629, p. 132. Sir John Eliot, De Jure Maiestatis, chap. 3. *Nemo suo statuto ligatur necessitative.*[1] Baldus, De Leg. et Const., Digna Vox (2 ed., 1496, fol. 51b Ed. 1539, fol. 61)."

It is to be remembered that the doctrine of immunity, so far as concerns the property of a foreign power, is of fairly recent development in our law. In the middle ages jurisdiction was asserted of foreign sovereigns in the courts of their feudal overlords.[2] As late as 1818 Sir John Leach V.-C. ordered the King of Spain to be named as a party to an action in the Chancery Court in order to charge his agent, holding distinctly that a foreign government or sovereign could be sued in England.[3] The earliest case in which the immunity of the public property of a foreign sovereign seems to have been accepted in the court of any English-speaking country

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[1] "Of necessity no person is bound by his own enactment." While this is true as a logical proposition, it is not the theory of the civil law, as is shown by the cases subjecting the domestic sovereign in European and Latin-American countries to the statute of limitations. Appendix II, page 96 below. This theory derives from the rescripts of the Roman Emperors Severus and Antoninus quoted by Justinian, Institutes, Book II tit. 17: "For, though the laws do not bind us, yet we live in obedience to them." This, we again point out, is the theory of the New York statute of limitations. Civil Practice Act §54, at page 93 below.

[2] E.g. the proceedings of Edward I of England against John Baliol, King of Scotland. Ryley, Placata Parliamentaria, page 143. As late as 1777 the Advocate-General Seguier argued in the French Court of Requests: "Pourquoi donc un souverain serait-il exempt? Il n'est souverain que dans ses états." *Hôtel du Souverain*, Requêtes [1777].

[3] *De la Torre* v. *Bernales*, 1 Ves. Jr. Hov. Supp. 149.

is *Moitez* v. *The South Carolina*, Fed. Cas. No. 9697 (Admiralty Pa. 1781), where no opinion was written. And the doctrine was not formulated in the United States courts until 1812 (*The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116), nor in the English courts until 1843 (*Duke of Brunswick* v. *King of Hanover*, 6 Beav. 1). Nothing in the doctrine of immunity as so far developed requires the exemption of the foreign sovereign from the statute of limitations.

It has been well said by a writer on the subject:

> "The foreign sovereign is immune from suit in the courts of another country, not because of any right in the sense of historical or analytical jurisprudence, but solely because by the process of judicial self-limitation in the interest of friendly intercourse among nations we judge it inexpedient to issue process of any sort or to sit in judgment."[1]

This consideration of inexpediency, together with Mr. Justice Holmes' consideration of lack of power, quite disappears when the claim of the foreign sovereign is submitted to the judgment of a municipal court which has the statute of limitations incorporated in its procedure and imposed by the policy of its own sovereign. The rights of the foreign sovereign which are involved in this case and which were assigned to the United States, arose under the municipal law of this country. The bank deposit belonging to the State of Russia existed in the ordinary commercial relation of debtor and creditor usual between banks and depositors. *Kingdom of Roumania* v. *Guaranty Trust Company*, 250 Fed. 341, 345 (C. C. A. 2, 1918), certiorari denied 246 U. S. 663. The

[1] Ernest Angell "Sovereign Immunity", 35 Yale Law Journal 150, 152 (1925).

Permanent Court of International Justice has pointed out with reference to the contracts of sovereigns:

> "Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country."[1]

In this instance the deposit of the foreign sovereign with the New York bank was unquestionably based on and subject to the municipal law of the State of New York. *Security Savings Bank* v. *State of California* (1923) 263 U. S. 282, 287-8. An essential part of the law of the deposit contract was the restriction upon the period during which it could be enforced. In his work *Actas y Tratados celebrados por el Congreso Internacional Sud-Americano de Montevideo* (Montevideo, 1911), Dr. Manuel Quintana, a Delegate for the Argentine to the Congress of 1888-9 which drew up the Montevideo Treaties on International Civil Law and Procedural Law,[2] clearly points out this conclusion. He says at pages 499-500:

> "What is, then, the law which should rule prescription under its double phase, extinctive and acquisitive? In the judgment of the majority of the Committee, the reply can be made in a general rule, to wit, that prescription is governed by the law which governs the juridic matter whose prescription is dealt with. Thus, prescription extinguishing personal actions is subordinated to the law of the place of their performance, that of real actions to the law of the situs of the properties encumbered, whether real or personal, and acquisitive prescription of corporeal things to the law of their situs, whatever their nature may be, in accordance with what

[1] *Government of the French Republic* v. *Government of the Kingdom of the Serbs, Croats and Slovenes*, Judgment No. 14, July 12, 1929, 2 Hudson World Court Reports 344, 371.

[2] See at page 96 below.

is enacted under the titles relative to properties and juridic acts.

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Under its extinctive phase, prescription is in effect nothing more than a means of enervating actions directed to the enforcement of pending obligations. As the resultant of the right of the creditor to force the debtor to carry out his agreed undertaking is a juridic obligation, the action is bound intimately to the obligation, and should be governed by the same law. When two persons contract, they agree, tacitly but clearly, that the period within which the one may proceed against the other, in order to hold him to the performance of his obligation, depends on the law under whose jurisdiction the action arose.

This solution, as Savigny points out, is that most in accord with principles and equity. With principles, because fixing in a definite manner the law on prescription, it prevents one of the parties from instituting anything in prejudice of the other. With equity, because, not only is it illicit for the creditor to select for the exercise of his action the place where prescription lasts longer, but also the debtor is not permitted to choose through a change of domicile the place where prescription lasts less long. * * *"

In the instant case, nothing in the history of sovereign immunity, nothing in the history of the rule *nullum tempus*, no precedent and no policy justifies the exemption of the foreign sovereign's claim to the bank deposit from the statute of limitations of New York as part of the procedure of the forum which its assignee has invoked. All the foreign sovereign or its assignee can reasonably ask is the same opportunity to sue as residents of the forum have. As Mr. Justice Story said in *LeRoy* v. *Crowninshield*, 15 Fed. Cas. No. 8269, at page 365 (C. C. Massachusetts 1820):

"Courts of law are instituted by every nation for its own convenience and benefit, and the nature of the remedies, and the time and manner of the proceedings, are regulated by its own views of justice and propriety, and

fashioned by its own wants and customs. It is not obliged to depart from its own notions of judicial order, from mere comity to any foreign nation. It is sufficient, if it gives to foreigners the same means to enforce their rights, as it does to its own citizens."

G. Prejudice to the petitioner from the lapse of time is apparent upon this record.

The present record illustrates the necessity for the application of the statute of limitations in actions by foreign states. The Soviet Revolution occurred on November 7, 1917, and the decree nationalizing the Russian banks who were debtors of the petitioner was enacted December 27, 1917 (R. 81). The petitioner's set-off whereby it absorbed the account in suit in payment of its claims against the State of Russia occurred February 25, 1918 (R. 82), and in it the ruble accounts owed to the petitioner were taken at their book value as of that time (R. 82). The present action was not commenced until September 21, 1934 (R. 1). The claim came into the hands of the plaintiff by assignment from the State of Russia on November 16, 1933 (R. 3), about sixteen years after the events which gave rise to the petitioner's set-off.

In this interval of sixteen years witnesses who would have been available for the petitioner for the trial of the action have died. Charles H. Sabin, President of the petitioner at the time of the transactions in question, died on October 10, 1933 (R. 83). Albert Breton, Vice-President in charge of the petitioner's Foreign Department at the time of the transactions in question (R. 223-4), died on December 22, 1936.[1] Grayson M-P Murphy, a director of the petitioner during

[1] New York Times December 23, 1936, page 17.

the time of the transactions in question and previously a Vice-President (R. 95, 235), died on October 18, 1937.[1] For the proof of the indebtedness owing to the petitioner by the State of Russia as assignee of the various Russian banks, debtors of the petitioner, which it nationalized, the petitioner might reasonably demand recourse to the books of account of those banks as containing the primary entries, and the opportunity to identify such books of account through witnesses familiar with them. The petitioner will be expected to prove the exchange value of the ruble at the time of the nationalization through the testimony of witnesses who have personal knowledge of ruble-dollar exchange transactions in December, 1917 and January, 1918. The Court will take judicial notice of the fact that since November, 1917, the State of Russia has been subject at intervals to revolution, civil wars, and great internal disturbance. The Russian banks which had original custody of the books of account have, of course, been nationalized. Their officers and employes have died, been exiled, or disappeared. Their books, if they have not been destroyed or lost beyond trace during the various commotions, have passed into the custody of various departments of the Soviet Government which has assigned to the United States the claim in suit.

Under these circumstances, it is probable that much evidence has been lost by the death or disappearance of witnesses and the destruction of records, and that petitioner will find it much more difficult at the present time to prove its set-off to the assigned claim than it would have been if suit had been brought within the period fixed by the statute of limitations.

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[1] New York Times October 19, 1937, page 25.

Existence of recognized representatives of State of Russia authorized to bring suit.

Yet it is clear that the Ambassador and the Financial Attaché recognized by the political department of our Government as speaking for the Government of the State of Russia, could at all times in and after 1918 have brought suit for the account here involved. So much has been expressly decided. *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. (2d) 396, certiorari denied 275 U. S. 571; *State of Russia* v. *Bankers Trust Co.*, 4 F. Supp. 417, 419, affirmed 83 F. (2d) 236 certiorari denied 299 U. S. 563; *Russian Government* v. *Lehigh Valley R. Co.*, 293 F. 133, 135 (D. C. S. D. N. Y. 1919). They made numerous attempts to obtain it without suit. Their counsel in conference with petitioner's counsel on June 26, 1919, stated exactly the theory upon which the Ambassador could sue for the account (R. 84, 113). The evidence and the findings of the District Court overwhelmingly show that the failure to bring suit was preceded by clear notice of petitioner's set-off and counterclaim (pp. 8-9) above. The Government of the State of Russia deliberately elected not to sue during the statutory period, although the petitioner again and again brought home to that Government its own claim to the money. The Financial Attaché wrote his counsel on July 14, 1919 (R. 146):

> "It is utterly useless to raise this subject with Mr. F. Polk [then Under-Secretary of State], as the result of all conversations with him always pointed toward an appeal to the Supreme Court which in my mind is to be avoided at all for the time being."

Thus it is plain that, if the innovation in the law which the decision below represents is to stand, this petitioner will

be prejudiced in its defense by the wilful and unexcused delay of action by the sovereign whose claim is now put in suit by the United States. The result will be not only injustice to the petitioner, but a precedent of unfortunate consequence to all American citizens who have commercial relations with foreign states. In an era when more and more foreign states are gathering into their hands the conduct of affairs formerly left to individuals, such a precedent is indeed disastrous. The decision of the Circuit Court of Appeals exposes to question and judicial inquiry the business dealings of American nationals with foreign powers over the entire period of the history of this country; since on the theory enunciated by that Court, no statute of limitations has run against any foreign government in any forum of this country from 1776 to the present day.

In so doing the decision below comes into conflict with what this Court and every other court has recognized to be a high public policy of the forum, namely to require the litigation of claims while the evidence is fresh. The exception to that policy running in favor of the local sovereign in the form of the rule *nullum tempus,* is dictated by another public policy of preserving the property of the people from the consequences of negligence of their officers. As this Court remarked in *United States* v. *Verdier,* 164 U. S. 213, 218 (1896),

> "The truth is that in its dealings with individuals public policy demands that the government should occupy an apparently favored position."

This exemption, as has been shown, is limited by the policy which gives it rise to the Government of the forum. Yet, so strong is the countervailing policy embodied in the principle of limitations that the local sovereign has been sub-

jected to it both by the course of judicial decision (pp. 32-5, 37-8 above) and by his own self-denying ordinance. This is true no less of the Federal than of the State sovereignties. With exceptions for fraud and evasion, internal revenue taxes generally must be assessed within four years, and proceedings in court for collection thereof without assessment must be begun within five years.[1] With similar exceptions, estate taxes must be assessed or sued for within three years.[2] With similar exceptions income taxes must be assessed within three years and sued for within six years after assessment.[3] So with gift taxes.[4] The statute of limitations on distraints for estate and gift taxes assessed is six years.[5] Claims by the United States on judgments of the Court of Claims against officers or agents of the United States, their guarantors or sureties, are barred three years after judgment of the Court of Claims.[6] Suits to recover penalties or forfeitures under the customs laws must be commenced within five years after discovery.[7] The Revised Statutes are full of limitations imposed by Congress upon the paramount sovereign in the interest of the public policy represented by the principle of repose. This is the principle overturned to the prejudice of the United States and its citizens by the decision of the Circuit Court of Appeals in the instant case. It is submitted that the District Court was right in holding that the granting of this privilege to foreign states, who come within our territorial limits and carry on business transactions here, is monstrous as a matter of public policy (R. 271).

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[1] 26 U. S. Code §1432.
[2] 26 U. S. Code §474.
[3] 26 U. S. Code §§275, 276.
[4] 26 U. S. Code §566.
[5] 26 U. S. Code, §§474, 566.
[6] 28 U. S. Code §287.
[7] 19 U. S. Code §1621.

This unwarranted extension of the theory of state immunity is particularly undesirable for the United States as a matter of policy, in view of the fact that it appears that the United States itself as a suitor in the courts of any other foreign country would not be accorded the same privilege of exemption from limitations. The foreign law authorities on this point are collected in Appendix II of this brief. While an existing rule of our law will not be modified against a foreign sovereign because it varies from his own law,[1] nevertheless the definite superiority of status which the decision below confers upon foreign sovereigns as suitors here by comparison with the status of the United States as a suitor elsewhere, is cogent reason against the establishment of an innovation in our law. The decision below, if affirmed, will give foreign sovereigns a degree of immunity and an advantage of delay against our citizens in our courts which in the reverse situation the courts of no foreign country would accord to the United States as a plaintiff there.

II.

When outlawed in the hands of the State of Russia, the claim here involved was not revived by assignment to the United States.

The District Court held that if the statute of limitations had run against the State of Russia as assignor prior to November 16, 1933, the date of the assignment, then by the assignment the United States as assignee took nothing

[1] *Berizzi Brothers* v. *The Pesaro*, 271 U. S. 562 (1926).

(R. 257). He regarded this point as one conceded by th United States, and in any event as entirely true. The opin ions of the Circuit Court of Appeals do not dissent from thi conclusion.

A. The claim barred in the hands of the assignor is barre in the hands of the assignee.

It is conceded, of course, that since the statute of limit tions does not bind the United States, the right of the Stat of Russia to the account in suit would still be open if th period of limitations had not been completed prior to N vember 16, 1933, the date of acquisition of the claim by th United States (R. 3). In view of the findings below, hov ever, to the effect that demand and refusal or their equiv lent occurred prior to June 30, 1922 (pp. 8-9 above), is clear that the six-year period of limitations was co pleted, and the defense perfected, long before November 1 1933. Under those circumstances, the acquisition of th claim by the local sovereign could not revive it or defe the bar.

This Court considered the point as beyond argument *U. S.* v. *Buford,* 3 Pet. 12 (1830). There the United Stat in 1823 took an assignment of a promissory note made 1812, and brought action thereon. The defendant plead the five-year statute of limitations of Kentucky. The demu rer of the United States to this plea having been overrule the decision was affirmed by this Court. At page 29 th Court said:

> "As more than five years had elapsed from the da of the receipt to the assignment, the statute of limi tions will bar a recovery of this claim, unless the tra fer of it to the United States has changed its charact

or the terms of the receipt prevent the statute from operating, or, by some promise or agreement between Morrison and Buford, the statute has been waived.

It can require no argument to show, that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor. If the character of the claim be so changed, as to exempt it from the operations of the statute of limitations, after the transfer, such transfer cannot have the effect to take the claim out of the statute when it has run."

This decision was cited with approval by this Court in *U. S.* v. *Nashville etc. R. Co.* (1885), 118 U. S. 120, 125, citing also *The King* v. *Morrall* (1818), 6 Price 24. In that case the Court of Exchequer sustained the plea of the statute of limitations against the Crown where the Crown's claim arose upon execution against a bill of exchange due by a person indebted to the Crown's debtor. The Court pointed out that in this case the claim of the Crown was only a derivative right, and it must therefore stand in the same situation as its principal. The Lord Chief Baron said (p. 28):

"I admit, that as between the Crown and its immediate debtor, this statute has no application. But in a case like this, where the question is what debt was due from the defendant to the Crown's debtor, the rule is very different; for the Crown is only entitled to its debtor's right, and cannot create or revive any right in the person of its debtor, if none ever existed, or it has become extinct. In this case, nothing could have been recovered by the debtor of the Crown against this defendant if the statute had been pleaded; I therefore consider that it is also a good bar to the suit of the Crown, who stands precisely in the same situation as its debtor, and that this is an honest plea, which therefore the law allows. If the Crown could thus put its debtor in a better situation than he was in before, by such a proceeding as this, the consequences would be monstrous before the passing of the late statute, and the mischief would have been incalculable."

Baron Garrow said (p. 30):

> "I am of the same opinion. Disposed, to the fullest extent, to protect the rights of the Crown, charged as it is with important trusts for the benefit of the community, of which it is the representative, I think that duty best performed by not carrying its claims beyond the line prescribed by justice: and I consider that the privilege now attempted to be established, would be both inconvenient and unjust. That debt was completely gone: then by a process, said, by a fiction, to be for the benefit of the Crown, it is attempted to revive the debt, and place the creditor in a better situation than the law permits. This is too gross an absurdity; and if we suppose the common case of one of the partners of a banking-house being a receiver-general, what extensive mischief might it not produce, when it is well known that the necessary acknowledgments are seldom interchanged on the settlement of banking accounts. It is right that the subject should take advantage of the principle of a statute, which, if it may in one or two cases through the laches of the party, have barred a just demand, yet has the constant effect of shutting out unjust claims founded on experiments made to take advantage of carelessness or misfortune on the chance of vouchers being lost or mislaid."

The principle that the United States as assignee stands in no better position than its assignor has been accepted by the courts in connection with the Litvinov assignment here involved. In *U. S.* v. *National City Bank,* 83 F. (2d) 236, certiorari denied 299 U. S. 563, the Circuit Court of Appeals for the Second Circuit held that the United States "having no more rights than its assignor", the State of Russia, was subject to set-off. See also *U. S.* v. *President and Directors of the Manhattan Company,* 276 N. Y. 396, 406-7 (1938) and *U. S.* v. *Belmont,* 301 U. S. 324, 335 (1937).

B. The defense of limitations, once perfected as against the State of Russia through its government then recognized by the United States, was not destroyed upon recognition of a new government through any doctrine of retroactivity or relation back.

The United States contended below that, even if the statute of limitations had run against the State of Russia by 1933, the resulting defense was in some way nullified by the recognition of the Soviet Government on November 16, 1933, since such recognition was retroactive to the inception of the Soviet Government on November 7, 1917. The District Court rejected this contention (R. 273). Judge Caffey said, in overruling it:

> "Even as to occurrences during the period when the Kerensky Government was recognized as the Russian State by the political branch of our Government, I am inclined to think that, under the authorities it has not been determined squarely yet that recognition of the Soviet Government carried back to the date of coming into being of the revolutionary government so recognized save as to acts done or property located within the territorial limits of the revolutionary government so recognized. I am inclined to think that, so far as concerns intra-Russia transactions, the doctrine of retroactivity applies. Whether or not, however, that has been authoritatively ruled, I am persuaded that it should be the law. On the other hand, in principle at least, as I read the decisions, it is established that recognition does not, under the doctrine of retroactivity, destroy a perfected or completed act or right which has occurred or come about within the territorial limits of the United States. This would seem to be particularly true as to such an act or right of an American in a transaction which he had had prior to that recognition. Otherwise put, I feel that, our Government having said to its own citizens that the Russian State was represented, and properly represented, by an Ambassador

> other than the one coming from the newly-recognized revolutionary government, I think the doctrine would be monstrous if, subsequent to reliance on the political branch of our Government having publicly assured the citizens of the United States that an individual whom our Government recognized as constituting, so far as we were concerned, the foreign state, the courts of the United States, dealing with what in the meantime had happened in this country, should take it upon themselves to say that, notwithstanding that recognition during that long period, so far as concerns what happened during that period, later recognition of a different revolutionary party in the foreign state would retroact in its effect to such an extent that it would destroy what had happened while citizens had acted on the faith of what their own government had done."

The Circuit Court of Appeals impliedly accepted the conclusion of the District Court on this point, in resting their reversal on the single proposition that the statute of limitations does not run against a foreign sovereign.

1. The doctrine of retroactivity or relation back is a doctrine of judicial development in the administration of justice, and is employed to accommodate the international status which a foreign regime acquires upon recognition by our political department, to the actual facts of its establishment. The effect of the principle is that, when a revolutionary movement in a foreign country has triumphed and transformed itself into a government recognized *de facto* or *de jure* by our Government, the acts of the new regime shall be given the force of law for our courts from the date of its inception. They are no longer to be regarded as the acts of *banditti* or mere mobs. *Underhill* v. *Hernandez* (1897) 168 U. S. 250, 253.

2. Hence, as Judge Caffey pointed out, the only operation of the doctrine of retroactivity has been to validate retrospectively the acts of the agents of the newly recognized foreign government *in its own country,* so as to save those acts from question in our courts. Such was the decision in *Underhill* v. *Hernandez* (1897) 168 U. S. 250, where the acts complained of were done by a military officer in Venezuela; in *Oetjen* v. *Central Leather Co.* (1918) 246 U. S. 297, where the question related to the seizure and sale of hides by General Villa in Mexico; in *Ricaud* v. *American Metal Company* (1918) 246 U. S. 304, where the transaction examined included acts of a Mexican commanding officer in seizing lead bullion in Mexico and selling it there; in *Luther* v. *Sagor & Co.* [1921] 3 K. B. 532, where the transaction complained of involved the seizure by the Soviet Government of a factory and a stock of wood in Russia; and in *Dougherty* v. *Equitable Life Assurance Society* (1934) 266 N. Y. 71, 84-5, where the act in question was that of the Soviet Government in cancelling Russian insurance policies expressly made subject by their terms to Russian law.

In none of these cases, and in no case so far as we have been able to find, has any court held that the effect of recognition of a new government is both to validate acts of the new government in its territory and *to invalidate acts of the predecessor government outside the territory of the state* done during the time when such predecessor government continued to be recognized by the political department of the forum. In fact, when the question was presented, in connection with litigation instituted by Mr. Bakhmeteff and Mr. Ughet on behalf of the State of Russia, whether the acts done by them and the judgments recovered by them would be invalidated retroactively by subsequent recognition of the

Soviet Government, the courts answered in the negative. *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. (2d) 396, certiorari denied 275 U. S. 571. Mr. Bakhmeteff on behalf of the State of Russia had brought suit against the Lehigh Valley Railroad Company on July 23, 1918, to recover for damage to the property of the Russian Government. 21 F. (2d) at 400. Defendant's motion to dismiss on the ground that there was in existence no Russian Government and therefore no plaintiff, was denied by the District Court upon the faith of the continued recognition extended by Mr. Bakhmeteff as Ambassador by the State Department. *Russian Government* v. *Lehigh Valley R. Co.* (1919) 293 F. 133. A renewed motion to dismiss was denied by Judge Mack on May 15, 1922 upon the authority of the prior decision of Judge Mayer. The case was then tried before Judge Goddard, who made an order changing the name of the plaintiff to the State of Russia and granted judgment for the plaintiff upon certain issues. 293 F. 135.

Thereupon and before trial of the remaining issues, the defendant Lehigh Valley Railroad Company made an application in this Court for an order of prohibition or mandamus prohibiting further proceedings in the action or for the dismissal thereof, upon the ground that Mr. Bakhmeteff was accredited by the Kerensky Government

> "which had been deposed and was without authority in or with respect to Russia";

and upon the ground

> "that no adjudication in the said action will protect the defendant, your petitioner, against claims which may hereafter be made in behalf of the State of Russia, if and when its present or any government of said State

shall be hereafter recognized as in friendly relations with the United States of America."[1]

This application was denied by this Court in 265 U. S. 573. The action then went to judgment, and upon appeal the defendant raised the same contention. In rejecting this contention the Circuit Court of Appeals, by Judge Manton, made the same distinction between intra-territorial and extra-territorial operation of retroactivity which the District Court has made in the instant case. Judge Manton said (21 F. [2d] at 401):

> "The argument that the plaintiff in error may at some future time, if the Soviet regime is recognized by our government, be compelled to pay again what it is obliged to pay now, is fallacious. It is only the acts performed in its own territory that can be validated by the retroactive effect of recognition."

In opposition to the defendant's petition for certiorari, the State of Russia argued in this Court:

> "Obviously, future recognition of a new government in Russia could not affect acts fully consummated in America between American nationals and the representatives of Russia duly recognized by the Government of the United States."[2]

Certiorari was denied by this Court in 275 U. S. 571.

Full reliance by American nationals upon the finality of the representative character accorded to foreign ambassadors and diplomatic agents by the recognition of the State Department, is indispensable for certainty of rights. This

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[1] Application and motion thereon for leave to file petition, etc., Actions Nos. 1 and 2, paragraphs 9, 23.

[2] Respondent's brief, pages 17-18. Mr. Ughet was at that time acting for the State of Russia in this country, the Ambassador having resigned June 30, 1922 (p. 6 above).

record illustrates the point. Upon the faith of the judgments obtained in the name of the State of Russia by Mr. Bakhmeteff and Mr. Ughet in the *Lehigh Valley* case alone, the sums of $980,431.24 and $3,673.38 were paid by the Lehigh Valley Railroad Company pursuant to order of the District Court dated December 21, 1927 (R. 243, 245-6). In addition, by virtue of the credit accorded them as representatives of the State of Russia, Mr. Bakhmeteff and Mr. Ughet disposed on behalf of the State of Russia of large sums of money standing with the National City Bank of New York in the name of Section Etrangère Ministère des Finances (R. 179) and under other titles (R. 177-82, 213). It would be indeed unconscionable if dealings of this kind could be undone by the automatic operation of a principle of retroactivity which has heretofore been applied by this Court strictly to the ascertainment of the governmental character of acts done by representatives of the new regime upon its own territory.

3. The reason for the continuing credit due the acts of the representatives of the last recognized government of Russia in this country, irrespective of the subsequent recognition of the Soviet regime which existed in Russia at the time those acts were being performed here, is of course the distinction clearly established in the authorities between the government and the State it represents. The Circuit Court of Appeals in the *Lehigh Valley* case, 21 F. (2d) 396, 400, 401, pointed out that the State is a community or assemblage of men, and the government the political agency through which it acts in international relations; that the foreign state is the true or real owner of its property, and the agency the representative of the national sovereignty: and that the granting or refusal of recognition to the Soviet

Government by the United States had nothing to do with the recognition of the State of Russia itself, which continued to enjoy recognition as an international person. In *The Sapphire,* 11 Wall. 164 (1870), this Court held that a libel filed for the French Government in the name of Napoleon III did not abate by his deposition. At page 168 Mr. Justice Bradley said:

> "The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the Euryale, not as an individual, but as sovereign of France. This is substantially averred in the libel. On his deposition the sovereignty does not change, but merely the person or persons in whom it resides. The foreign state is the true and real owner of its public vessels of war. The reigning Emperor, or National Assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. The next successor recognized by our government is competent to carry on a suit already commenced and receive the fruits of it."

Thus the acts done by and with the petitioner by Mr. Bakhmeteff and Mr. Ughet as agents of the then recognized Provisional Government of Russia, were acts done on behalf of the State of Russia by the only agency of that State then recognized by our political department, i.e. the Provisional Government. With the propriety of that sole agency our courts were not and are not concerned. It was and is a fact. The subsequent recognition of the Soviet Government does not change the fact that for the United States the agency of the State of Russia in the period November 7, 1917, to November 16, 1933, was the Provisional Government acting by its recognized representatives. What that agency did in this coun-

try through Mr. Bakhmeteff and Mr. Ughet bound the State of Russia as fully as the acts of the Soviet Government in Russia. The judgments they collected, the acquittances they gave, the payments they received, and the legal rights which accrued and were brought to fruition by them in this country must remain final, so far as concerns the State of Russia, if the credit given by the courts to the effect of political recognition is not to be made a farce and an instrument of injustice.

4. This conclusion has indeed been recognized in the exchange of notes between the President and the Commissar for Foreign Affairs. Therein the Soviet Government formally undertook

> "not to make any claim with respect to:
>
> * * * * * * *
>
> (b) acts done or settlements made by or with the Government of the United States, or public officials, in the United States, or its nationals relating to property, credits, or obligations of any Government of Russia or nationals thereof."

The repudiation and denial of liability by the petitioner to the then officially recognized representatives of the Russian Government, with respect to the account in suit, was an act done by an American national relating to property or credits of a Government of Russia, which under the terms of the agreement of recognition is protected from question by the Soviet Government. The effect of such act in outlawing the present cause of action is thus expressly saved. The Circuit Court of Appeals for the Second Circuit so held in *State of Russia* v. *National City Bank*, 69 F. (2d) 44, 48 (1934), saying that the Soviet Government by the language quoted

> "agreed to leave undisturbed diplomatically * * * non-judicial acts done in good faith by and with the officials of the previously recognized government of Russia."

Hence, from every approach the conclusion follows that the defense of limitations, once perfected in the petitioner by the accrual of a cause of action more than six years prior to November 16, 1933, was not affected by the assignment to the United States or by the recognition of the Soviet Government.

III.

The assignment of the State of Russia to the United States does not override the state statute of limitations, and the holding of this court in the *Belmont* case has no application here.

The decision of this Court in *United States* v. *Belmont*, 301 U. S. 324, rendered May 3, 1937, came down after the District Court had entered its judgment in the instant case and during the briefing of the case on appeal. Both the opinions in the Circuit Court of Appeals rest the decision in part upon language used by this Court in the *Belmont* case (R. 284, 288, 91 F. [2d] at 900, 901). It is submitted that neither the language nor the holding of this Court in the *Belmont* case authorizes the decision below, and that the correspondence between the President and the Commissar of Foreign Affairs, constituting an executive agreement, not a treaty in the constitutional sense, could not and does not purport to modify or repeal a State statute adopted by Congress for the United States courts.

A. Neither the language nor the holding in the Belmont case authorizes the decision below.

In *United States* v. *Belmont,* this Court had before it judgments of the lower courts dismissing, for failure to state facts sufficient to constitute a cause of action, the complaint in an action brought by the United States to recover moneys under the Litvinoff assignment. The dismissal had been grounded on the holding that the public policy of the United States and of the State of New York forbade the courts to enforce the confiscatory decrees under which the moneys assigned had become the property of the Soviet Government. 85 F. (2d) 542. It did not appear that the defendants holding the moneys had any interest in the matter beyond that of a custodian. 301 U. S. at 332.

Upon these facts this Court held *merely* that the complaint stated a cause of action in that at this stage of the action no right of any American national appeared to have been affected and so the applicable public policy did not operate. The Court divided as to what public policy would govern when the question came to be raised by one having an interest. The majority, speaking by Mr. Justice Sutherland, said that the policy of the United States alone mattered. The minority, speaking by Mr. Justice Stone, said that the policy of the State of New York also mattered. But all members of the Court were in agreement (1) that no question had been effectively raised under whatever public policy was applicable, (2) that the decision made concerned only the case then presented, (3) that it concerned only the parties then before the Court, and (4) that the status of adverse claims were not affected by the decision. 301 U. S.

at 333, 337. In consequence the case was sent back to the District Court for trial after issue should be joined.

This summary of the actual decision in the *Belmont* case sharply differentiates it from the instant case. The petitioner here, defendant below, is not a stakeholder, but a *bona fide* adverse claimant. Its claim, maintained ever since February 25, 1918 (R. 81-2), is set forth in the findings of the District Court (R. 267) and acknowledged by the Circuit Court of Appeals (R. 282, 285, 91 F. [2d] at 899, 900). At R. 288, 91 F. (2d) at 902, Judge Manton speaks of the petitioner as asserting "an adverse claim" against the bank deposit. Again this petitioner invokes, not a rule of policy either State or Federal, but the statute law of New York made applicable in the United States courts by the statute law of the United States.[1] Finally, the petitioner is in this Court, not in consequence of a motion to dismiss on a point of law arising on the complaint, but after judgment obtained upon a full showing of the facts in accordance with the New York practice in support of a defense of limitations which, if maintainable in law against a foreign sovereign, is decisive of the action.

Having regard, therefore, to what this Court actually *decided* in the *Belmont* case, we believe it is manifest that that decision has no relation to the case here presented. How, then, did the *Belmont* case come to be so influential in the determination below? Because, in arriving at the choice of Federal public policy to the exclusion of State public policy as the criterion of the enforceability of the Russian decrees in the United States courts, the majority

[1] Rules of Decision Act 28 U. S. Code §725, Rev. Stat. §721.

used words which, taken out of their context, appear to have a meaning broader than the actual decision.[1]

In the *Belmont* case, the majority said (301 U. S. at 331):

> "Plainly, the external powers of the United States are to be exercised without regard to state laws or policies."

It is obvious that this language was used without relation to any question (since no such question was before the Court) of the legislative force of an executive agreement, viewed *internally,* if in conflict with a State law. Again the majority said that, when judicial authority is invoked in aid of an undertaking by the United States in the field of foreign relations (301 U. S. at 332),

> "* * * state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power."

Here again the Court did not direct its attention to the question of the legislative force of an executive agreement as against a conflicting State or Federal statute, inasmuch as no such question was before it. The Court rather addressed itself to the definition of public policy made in the brief of the respondents, which at page 38 quoted *People* v. *Hawkins,* 157 N. Y. 1, 12 (1898):

> "The courts * * * have held that a state can have no public policy except what is to be found in its constitution and laws."

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[1] The New York Court has well said: "The language of any opinion must be confined to the facts before the court. No opinion is an authority beyond the point actually decided, and no judge can write freely if every sentence is to be taken as a rule of law separate from its association." *Dougherty* v. *Equitable Life Assurance Society,* 266 N. Y. 71, 88 (1934).

Manifestly, in the language of this Court employed in the *Belmont* case upon which the Circuit Court of Appeals in part rested its decision, there was no attempt to lay down a rule of decision for the totally different situation now presented. That language must be limited by the circumstances in which it was used. *Taylor* v. *Voss,* 271 U. S. 176, 184 (1926).

B. The exchange of letters of November 16, 1933, does not purport to override State and Federal statutes.

The assignment from the State of Russia (Appendix I p. 93 below) speaks of

> "the amounts admitted to be due or that may be found to be due it [the Union of Soviet Socialist Republics], as the successor of prior Governments of Russia, or otherwise, from American nationals * * *"

and with respect thereto says that the Soviet Union

> "will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment."

In acknowledgment of the note containing this language, President Roosevelt says (p. 94 below):

> "I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics * * *".

From this language of the correspondence constituting the executive agreement, it is plain that, as to amounts not admitted by any given American national to be due to the Soviet Government, the parties to the assignment contemplated litigation. It would be pursuant to such litigation, in such court as the United States as assignee would select, that such amounts as were not *admitted* to be due might be *found* to be due. Further it appears that the United States is to notify the Soviet Government of any amount *realized* by the United States in consequence of litigation.

Thus the executive agreement in question implicitly adopted the entire procedure of the forum which the United States as assignee might select for suit on the claims assigned. It does not intimate in the remotest manner an intention of either contracting sovereign to repeal any law of a state or of the United States forming part of that procedure. This fact is patent on the face of the correspondence and is indeed too clear for argument. Mr. Justice Sutherland speaking for the majority in *United States* v. *Belmont*, 301 U. S. 324, did not hold to the contrary. He held that the negotiations, acceptance of the assignment, and agreements and understandings in respect thereof were within the competence of the President speaking for the national government as vested exclusively with power over external affairs. 301 U. S. at 330. He also held that state laws or policies could not control the President in the exercise of the external powers of the United States. 301 U. S. at 331. He held finally that the only public policy relevant to the determination of the property right conveyed by the assignment, would be the public policy of the United States, although he expressly forbore to decide whether the policy of the United States as regards confiscatory foreign decrees was in any

respect different from the public policy of the State of New York.

The minority speaking by Mr. Justice Stone pointed out that the executive agreement did not purport even to affect state policy. Stating as an assumption that the United States might by treaty alter a state policy, Mr. Justice Stone said (301 U. S. at 336):

> "* * * It is unnecessary to consider whether the present agreement between the two governments can rightly be given the same effect as a treaty within this rule, for neither the allegations of the bill of complaint, nor the diplomatic exchanges, suggest that the United States has either recognized or declared that any state policy is to be overridden."

After referring to the correspondence, he continued:

> "There is nothing in either document to suggest that the United States was to acquire or exert any greater rights than its transferor, or that the President, by mere executive action, purported or intended to alter the laws and policy of any state in which the debtor of an assigned claim might reside, or that the United States, as assignee, is to do more than the Soviet government could have done after diplomatic recognition—that is, collect the claims in conformity with those laws. Cf. *Todok* v. *Union State Bank*, 281 U. S. 449."

In *Todok* v. *Union State Bank* (1930), 281 U. S. 449, this Court had before it a treaty in the full constitutional sense between the United States and Norway, which the Supreme Court of Nebraska had held to be in conflict with the subsequently enacted homestead law of that State. Reversing the judgment of the state court, this Court pointed out that despite the liberal interpretation due to treaties to give effect to their apparent purpose (p. 455),

> "It is not to be supposed that the treaty intended to secure the right of disposition in any manner whatever regardless of reasonable regulations in accordance with the property law of country or location, bearing upon aliens and citizens alike."

Holding that the treaty did not override the law of the state, the court pointed out that, if it did so, it would place an alien owner of a homestead in Nebraska on a better footing than a citizen (p. 454).

The present case is an infinitely stronger one for the State law. The executive agreement alleged to be conflicting contains no hint of any intention to override any state or federal statute, no language apt for that purpose. In this case, even more clearly than in the *Todok* case, the invalidation of the state law by the executive agreement would place a foreign sovereign on a better footing than a citizen of the state or than any other suitor whatever, and would unreasonably exempt the foreign sovereign from a historic policy which in all countries and in all courts has barred stale claims in the interest of justice.

By reason of the fact that the executive agreement here involved does not even purport to interfere with existing State laws adopted by the Rules of Decision Act, we need only state the proposition that, in any event, a mere executive agreement cannot have legislative force in derogation of existing law. Constitution, Art. II, Section 2, Art. VI, Clause 2. That the exchange of letters of November 16, 1933, is not a treaty in the constitutional sense was recognized by the majority in *U. S.* v. *Belmont,* 301 U. S. 324, at 330. See also Mr. Justice Sutherland's opinion in *U. S.* v. *Curtiss-Wright Corporation,* 299 U. S. 304, 318 (1936) and his book *Constitutional Power and World Affairs* (Columbia University Press 1919) pages 120-1, 125, 137-8. In this

work he points out (p. 125) the wisdom of the constitutional requirement that a treaty which shall be the supreme law of the land, be ratified by the Senate in which every State would have an equal vote and an equal opportunity of being heard.

The attribution of legislative force to an executive agreement not constituting a treaty in the constitutional sense, with the effect of striking down a State and Federal statute which protects the petitioner in its continued adverse claim to property, would be a violation of the Fifth Amendment (R. 272). Even if the executive agreement in question were susceptible of construction as repealing or modifying a State law, which we submit it is not, a construction thereof should be avoided which would throw doubt on its constitutionality. *Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481, 492 (1931).

CONCLUSION.

The defense of limitations has been fully sustained, the foreign sovereign's claim is subject thereto and was barred thereby before the United States acquired title, the judgment of the District Court was right, and the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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Counsel for Petitioner.

March 7, 1938.

APPENDIX I.

Statutes and Executive Agreement Involved.

The Rules of Decision Act, 28 United States Code §725, Rev. Stat. §721, provides:

> *"Laws of States as rules of decision.* The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The Conformity Act, 28 United States Code §724, Rev. Stat. §914, provides:

> *"Conformity to practice in State courts.* The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."

The Civil Practice Act of the State of New York §48 provides, so far as material:

> "The following actions must be commenced within six years after the cause of action has accrued:
>
> 1. An action upon a contract obligation or liability express or implied, except a judgment or sealed instrument."

The Civil Practice Act §15 provides, so far as material:

> "Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete except in one of the following cases:
>
> * * * * * * * *

2. Where there was a deposit of money not to be repaid at a fixed time but only upon a special demand, or a delivery of personal property not to be returned specifically or in kind at a fixed time or upon a fixed contingency, the time must be computed from the demand."

The Civil Practice Act §54 provides:

"The limitations prescribed in this article for actions other than for the recovery of real property apply alike to actions brought in the name of the people of the state, or for their benefit, and to actions by private persons."

Rule 107 of the Rules of Civil Practice of the State of New York provides, so far as material:

"Within twenty days after the service of the complaint, the defendant may serve notice of motion for judgment dismissing the complaint, or one or more causes of action stated therein, on the complaint and affidavit stating facts tending to show:

* * * * * * * *

6. That the cause of action did not accrue within the time limited by law for the commencement of an action thereon."

The executive agreement concluded November 16, 1933, between the President of the United States and the People's Commissar for Foreign Affairs of the Union of Soviet Socialist Republics, consisted in an exchange of letters as follows:

Washington, November 16, 1933.

My Dear Mr. President: Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counterclaims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or

initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above not to make any claims with respect to:

(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interest therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

I am, my dear Mr. President,

Very sincerely yours,

MAXIM M. LITVINOV,
People's Commissar for Foreign Affairs, Union of Soviet Socialist Republics.

MR. FRANKLIN D. ROOSEVELT,
President of the United States of America,
The White House.

The White House,

Washington, November 16, 1933.

My dear Mr. Litvinov: I am happy to acknowledge the receipt of your letter of November 16, 1933, in which you state that:

[Foregoing letter of Mr. Litvinov set forth textually except for salutation and subscription]

I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics, and of the amount that may be found to be due on the claim of the Russian Volunteer Fleet.

I am, my dear Mr. Litvinov,

Very sincerely yours,

FRANKLIN D. ROOSEVELT.

MR. MAXIM M. LITVINOV,
People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics.

APPENDIX II.

The following excerpts from the statute law and decisions of the countries of continental Europe and of Central and South America show the universality with which the local sovereign is barred by the local rule of prescription or limitation. *A fortiori*, a foreign sovereign would, under all these systems of law, be barred by the same lapse of time. The only country in which that question has been directly passed upon appears to be France, where the Paris Court of Appeal in 1867 held the Spanish Government barred by the period of prescription applicable to the French Government. In Argentina and Paraguay the statute of limitations is expressed to bind foreign states.

ARGENTINA:

Civil Code (1871):

> "Art. 34. Also foreign states, each one of their provinces or principalities, establishments, corporations or associations existent in foreign countries and which existed therein under like conditions with those of the preceding article, are juridic persons."
>
> "Art. 3951. The national or provincial state, and all juridic persons are subject to the same prohibitions as private individuals with regard to their properties or rights whch are susceptible of being private property, and they may likewise plead prescription."

Argentina ratified by Law No. 3192 of December 6, 1894, the Montevideo Treaties on Private International Law (1889). These included a Treaty of International Civil Law signed February 12, 1889, and a Treaty of International

Procedural Law signed January 11, 1889. The Treaty of International Procedural Law provides in part:

> "Art. 1. Suits and their incidents, whatever may be their nature, shall be transacted in accordance with the procedural law of the nation in whose territory they are brought."

The Treaty of International Civil Law provides in part:

> "Art. 3. The state in the character of juridic person has capacity to acquire rights and to contract obligations in the territory of another state, in accordance with the laws of the latter."
>
> "Art. 51. Extinctive prescription of personal actions is governed by the law to which the correlative obligations are subject."
>
> "Art. 56. Personal actions must be brought before the judges of the place to whose law the juridic act, which is the subject matter of the suit, is subject."

A. T. deFreitas, *Civil Code of the Argentine*, Buenos Aires, 1909, Volume I, pages 143-4, says with reference to Article 34 of the Civil Code:

> "All the writers on the public law say that nations are moral or juridic persons, and if, in addition to their internal and external relations, they can hold property in various countries, it is clear also that they are persons of civil law and that in each country they can be subjected to the jurisdiction of the civil authorities and courts."

In the following cases the courts of Argentina have allowed the defense of prescription against the State:

> *Provincia de Buenos Aires* v. *Club Mar del Plata*, June 28, 1926, 20 Jurisprudencia Argentina 575;
>
> *Provincia de Buenos Aires* v. *Compania Nacional de Grandes Hoteles*, June 28, 1926, 20 J. A. 580;

Provincia de Buenos Aires v. *Luro de Mesquita*, September 15, 1926, 22 J. A. 54;

Provincia de Buenos Aires v. *Ghibaudi*, December 20, 1930, 34 J. A. 1434.

BELGIUM.

Civil Code (1804):

> "Art. 2227. The State, public institutions, and principalities are subject to the same rules of prescription as are private persons, and may invoke them likewise."

In response to a questionnaire of the Rumanian Government as to the rights of foreign governments inheriting real estate in Belgium, in connection with the Zappa controversy between Greece and Rumania, the Belgian Minister of Justice advised (26 A. J. I. L. [1932] p. 593):

> "A foreign state to which a private individual leaves real estate situated in Belgium is there subject to all the laws which govern the matter of inheritance, *like every foreign person* inheriting in Belgium. * * *
>
> "These conclusions flow from two rules which are themselves based on the principle of the sovereignty and of the mutual independence of nations, viz:
>
> "1. That, apart from the buildings of foreign legations and their dependencies, the real property which a foreign state possesses in a foreign country does not cease to form part of the territory of such country;
>
> 2. That a foreign state can own property abroad *only in the right of a civil person;* that in taking the status of heir in a foreign country, it assumes a purely civil status and not the status of a government in the exercise of its *imperium* (Decree of the Court of Brussels, July 1, 1891. *Debock* v. *Congo State*, Decree of the Court of Ghent, March 14, 1879. *Vanden Abeele* v. *State of Peru*, Pasic. 1879, p. 17 et seq.)."

Bolivia.

Bolivia ratified by law of November 5, 1903, the Montevideo Treaty of International Civil Law and the Treaty of International Procedure Law (pp. 96-7 above).

Bolivia has also ratified the Pan-American Code of Private International Law, signed at the Sixth International Conference of American States at Havana in 1928. This Code provides in part:

"Art. 31. Each contracting state, as a juristic person, has full capacity to acquire and exercise civil rights and to assume obligations of the same character within the territory of the others, without restrictions other than those expressly established by the local law."

"Art. 229. Extinctive prescription of personal actions is governed by the law of the place where the object to which it refers is situated."

"Art. 333. The judges and courts of each contracting state shall be incompetent to take cognizance of civil or commercial cases to which the other contracting states or their heads are defendant parties, if the action is a personal one, except in case of express submission or of counterclaims."

Brazil.

Civil Code (1916):

"Art. 13. Juridic persons are of public law, internal, or external, and of private law.

Art. 14. Juridic persons of internal public law are:

I. The Union.

II. Each of its States and the Federal District.

III. Each of the legally constituted Municipalities."

"Art. 163. Juridic persons are subject to the effects of prescription and can invoke it whenever it is to their benefit."

Civil Code (1885):

> "Art. 2497. The rules relative to prescription are applied in favor of and against the State, churches, municipalities, national establishments and corporations and private individuals who have the free administration of what is theirs."

The courts of Chile have sustained the defense of extinctive prescription (limitations) against the Chilean Government as plaintiff in

> *Fisco con. Urriaga,* Gaceta de los Tribunales, 1883, page 1129;
>
> *Fisco con. Goyenechea,* Id., 1889, volume II, page 358.

In *Inscription de bienes raices del Gobierno de Bolivia,* Gaceta de los Tribunales, 1912, volume II, page 813, 26 A. J. I. L. Supp. (1932) page 584, the Supreme Court of Chile affirmed a judgment permitting recordation of a deed for real estate purchased by the Bolivian Government, saying:

> "Considering:
>
> 1. That, according to the rules of International Law, States in their mutual relations have a juridical personality enabling them to acquire rights and contract obli- persons."
>
> 2. That the property situated in a country is ruled by its laws, that natural as well as juristic persons may acquire it, subject to the legal regulations that control the rights and obligations relative to such goods.
>
> 3. That these principles do not suffer any modification in the case of property that may be acquired by a foreign government, because according to International

Law property can be acquired by a State in the territory of another State, without exercising upon it more than the ordinary power allowed to an individual, and not the power that always pertains to the sovereign of the territory. * * *"

COLOMBIA.

Law 153 of 1887:

"Art. 80. The Nation, Departments, Municipalities, public charitable establishments and schools, and the corporations created or recognized by law, are juridic persons.

Civil Code (1873):

"Art. 2517. The rules relative to prescription are applied equally in favor of or against the Nation, the Territory, the Municipalities, the establishments and corporations and the private individuals who have free administration of their property."

Colombia by Law 40 of 1933 and by Law 68 of 1920 adhered to the Montevideo Treaties on International Civil Law and on Procedure Law (pp. 96-7 above).

The courts of Colombia have allowed the defense of prescription to be invoked in actions brought by the Government in the following cases:

Nacion v. *Zapata*, judgment dated June 28, 1920, 28 Gaceta Judicial 96;

Nacion v. *The Barranquilla Railway & Pier Company, Ltd.*, judgment dated November 15, 1920, 28 Gaceta Judicial 252;

Departamento del Tolima v. *The Dorada Extension Railway, Ltd.*, judgment dated November 4, 1930, 38 Gaceta Judicial 418;

Nacion v. *Pedrosa*, judgment dated May 20, 1935, 42 Gaceta Judicial 75;

Nacion v. *Trujillo*, judgment dated June 21, 1935, 42 Gaceta Judicial 228;

Nacion v. *Gamboa Guzman & Co.*, judgment dated August 14, 1936, 44 Gaceta Judicial 250;

Nacion v. *Guevara y Bourdon*, judgment dated October 19, 1936, 44 Gaceta Judicial 385;

Nacion v. *Bechara Hermanos*, judgment dated December 1, 1936, 44 Gaceta Judicial 577.

Julian Restrepo-Hernandez, in his work *Derecho Internacional Privado* (2nd Ed., Bogota, 1928), volume I, says:

"103. States are juridic persons before every other State; they do not require any recognition or legalization whatever; they are called *necessary juridic* persons. When a new State is formed, either by emancipation from the metropolis, as happened with our country, or by dismemberment from another, as Uruguay, then it is customary for States to recognize the new nationality.

104. The private rights which a State may acquire exercise or assert within another State are subject to the limitation which the latter imposes, consulting its security or basing itself on juridic reasons * * *."

COSTA RICA.

Civil Code (1888):

"Art. 6. Prescription and everything concerning the mode of performing or extinguishing obligations resulting from any juridic act or contract to be performed in Costa Rica, shall be governed by Costa Rican laws, even though the parties be foreigners and the act or contract may not have been performed or entered into in the Republic."

"Art. 15. The existence of civil [juridic] persons arises from the law, excepting that of the State which is of full right a perpetual moral [juridic] person."

"Art. 27. Every civil [juridic] person in its contractual juridic relations is on an equality with the natural person and remains subject to the same requirements of the common law."

Costa Rica has ratified the Pan-American Code of Private International Law (p. 99 above).

CUBA.

Civil Code (1899):

"Art. 35. The following are juridic persons:

1. The corporations, associations and foundations of public interest recognized by law.
Their legal status commences from the moment they may have been validly constituted, pursuant to law.

2. The associations of private interest, whether civil, mercantile or industrial, upon which the law confers their own legal status, independent of the status of each one of the associates.

Art. 1932. Rights and actions are extinguished by prescription in prejudice of every class of persons, including juridic persons, in the conditions provided by law."

Cuba has ratified the Pan-American Code of Private International Law (p. 99 above).

DOMINICAN REPUBLIC.

Civil Code (1884):

"Art. 2227. The State, the public establishments and the municipalities, are subject to the same prescriptions as individuals, and may oppose them in the same manner as the latter may."

The Dominican Republic has ratified the Pan-American Code of Private International Law (p. 99 above).

ECUADOR.

Civil Code (1887):

> "Art. 2479. The rules relating to prescription are applied equally in favor of or against the State, churches, municipalities, national establishments and corporations, and private individuals who have the free management of their own [properties and rights]."

Ecuador has ratified the Pan-American Code of Private International Law (p. 99 above).

ENGLAND.

The English cases assimilating foreign sovereign plaintiffs in all respects to private corporations for purposes of cross-bill, discovery, costs, etc., are discussed in the foregoing brief (pp. 39-43 above).

John Selden in his *Table Talk* (Ed. Pollock 1927, p. 68) says:

> "The King of Spain was outlawed in Westminster Hall, I being of counsel against him. A merchant had recovered costs against the King of Spain in a suit, which because it could not be got, we advised to have him outlawed for his not appearing; and so he was. As soon as Gondomar [the Spanish Ambassador] heard that, he presently sent the money, by reason if his master had stood outlawed he could not have had the benefit of the law, which would have been very prejudicial, there being then many suits depending between the King of Spain and our English merchants."

Westlake says in *Private International Law* (7th Ed. p. 272):

> "A foreign sovereign or person entitled to the privilege of ex-territoriality, bringing an action in England will be bound, as a private corporation or person would be bound, to do complete justice to the defendant with

regard to the matters comprised in the action and will be subject to all cross-actions, counter-claims, defenses and steps of procedure which as between private parties, would be competent to the defendant for the purposes either of obtaining such complete justice or of defending himself against the plaintiff's claim. It was the old maxim of the Court of Chancery: 'That he who seeks equity must do equity.'"

FRANCE.

Civil Code (1804):

"Art. 2227. The State, public institutions, and principalities are subject to the same rules of prescription as are private persons, and may invoke them likewise."

Aubry & Rau, *Droit Civil*, Volume II, §211, say:

"The defense of the statute of limitations is in principle available as against all physical persons and legal entities. * * * Thus one can avail oneself of this defense against the State * * * just as in the same manner one can against any private individual."

A foreign State was held to be barred by Article 2227 in *Gouvernement espagnol* v. *Veuve et heritiers d'Aguado*, Dalloz 1867 II, page 49, Sirey 1867 II, page 214. From 1826 on Aguado had been a financial agent for the Spanish Government. His last account was rendered in 1832. This account was not accepted by the Spanish Government, and correspondence ensued. In 1863, Aguado having died, the Spanish Government sued his estate for Fr. 3,611,201. The Civil Tribunal of the Seine sustained the defense of limitations, saying in part:

"Whereas the complaint of the Spanish Government is dated November 16, 1863; the last of the accounts being dated December 31, 1932, all the accounts are covered by prescription; this is true therefore for all the amounts carried or omitted in these accounts and

there is no need to ascertain the precise date when prescription began to run for each of them;

Whereas the Spanish Government did, it is true, raise protests almost at once concerning the accounts presented by Aguado; it immediately engaged in correspondence on this point; it requested the opinion of the officials under its direction, appointed committees, sent agents to Aguado to settle with him, proposed an arbitration; the Government in 1850 applied to the widow Aguado, Marquise de Las Marismas, and stated at that time its purpose of going before the courts; Aguado on the other hand employed the same diligence in taking measures to reach a settlement with the Spanish Government; he answered at once all the objections made to him; he got into touch with persons who had the confidence of the Spanish Government; he even sent representatives to Madrid; but all these facts do not prove a novation or interruption of prescription, which could take place only by the filing of a complaint similar to that which took place belatedly November 16, 1863;

Whereas the nature of Aguado's possession has on behalf of the Spanish Government been attacked to no avail, and the point made to no avail that it could not give rise to prescription; there is involved in this case an extinctive prescription for which no question of possession or question of good faith can be raised; in addition Aguado has always asserted his rights with respect to the sums in controversy, and this controversy, arising from the interpretation of agreements, gives no ground to question the good faith of either party."

On the appeal of the Spanish Government, the Paris Court of Appeal affirmed the judgment upon the opinion of the Civil Tribunal.

In *Dame de Latude et al* v. *S. S. Leon XIII et al,* Clunet (1892) page 447 (1893) page 731, 26 A. J. I. L. Supp. (1932) page 595, the Civil Tribunal of Montdidier held that the Pope could inherit in France as a foreign sovereign, but only subject to the special authorization required of all persons by Civil Code Art. 910. The Court said in part:

"Foreign States as a matter of absolute right and necessity constitute moral persons of the first order capable of obligating themselves, of acquiring, and of receiving by treaties and *a fortiori* by contracts or acts of civil law; the capacity of each State, complete in its own sphere, is limited so far as concerns its acquisitions in the sphere of other states, by the sovereignty of the latter, by their legislation, and by international practice * * *."

GERMANY.

In response to a questionnaire of the Rumanian Government as to the rights of foreign governments inheriting real estate in Germany, in connection with the Zappa controversy between Greece and Rumania, the law faculty of the University of Berlin gave the following opinion in part (20 Clunet [1893] 727, 739):

"II. The State which claims property on the basis of a testamentary disposition, discards its role of sovereign power, in order to become a simple juristic person placing its private rights under the protection of the laws applicable to all citizens. The German Treasury on the other hand is subject to the jurisdiction of the ordinary courts when the controversy refers to interests other than those which the Government in the interest of the fulfilment of its high political and social mission, is charged with protecting. One can invoke against the Treasury, there is no doubt as matter of principle, the application of the rules of the common law."

GUATEMALA.

Civil Code (1933):

"Art. 15. The following are juridic persons:

1. The State, the municipalities, the institutions, foundations and corporations of public character, created or recognized by the law * * *"

"Art. 1050. The State, as well as the Municipalities and all public establishments are considered as private persons in respect of prescription."

Guatemala has ratified the Pan-American Code of Private International Law (p. 99 above).

HAITI.

Civil Code (1825):

"Art. 1995. The State is subject to the same prescriptions as individuals and may equally oppose such prescriptions."

Haiti has ratified the Pan-American Code of Private International Law (p. 99 above).

HOLLAND.

Civil Code:

"Art. 1991. The State, public institutions, and principalities are subject to the same rules of prescription as are private persons, and may invoke them likewise."

Cremers in *Aantekeningen op. de Nederl.-Wetboeken*, §1287, says in commenting upon Article 1991:

"* * * The rules of the Civil Code concerning prescription are applicable also to claims based upon relations between a citizen and a State in its sovereign capacity * * *"

HONDURAS.

Civil Code (1906):

"Art. 56. The following are juridic persons:

1. The State and the corporations, associations and foundations of public interest, recognized by law * * *

Art. 2265. Rights and causes of action are extinguished by prescription in prejudice of every class of persons, including juridic persons, in the terms provided by law."

Honduras has ratified the Pan-American Code of Private International Law (p. 99 above).

ITALY.

Civil Code:

"Art. 2114. The State, public institutions, and Municipalities are subject to the same rules of prescription as private persons are, and can invoke them likewise."

MEXICO.

Civil Code for Federal District and Territories (1932):

"Art. 25. The following are moral [juridic] persons:

I. The Nation, the States and the Municipalities;

II. Other corporations of public character recognized by law * * *

Art. 1137. Except as may be otherwise established by law, only the properties and obligations which are in commerce may be subject to prescription.

Art. 1148. The Union, the Federal District and Territories, as the case may be, as well as the Municipalities and other moral [juridic] persons, shall be considered as private persons in regard to prescription of their properties, rights and causes of action which may be susceptible of private ownership."

NICARAGUA.

Civil Code (1904):

"Art. 878. The State and all other juridic persons are subject to prescription the same as individuals."

Nicaragua has ratified the Pan-American Code of Private International Law (p. 99 above).

PANAMA.

Civil Code (1926):

"Art. 38. * * * A juridic person is a moral entity or fictitious person, of political, public, religious, industrial or commercial character, represented by a natural person or persons, capable of exercising rights and contracting obligations.

Art. 64. The following are juridic persons:

1. The political entities created by the Constitution or by the Law * * *

Art. 1670. Rights and causes of action are extinguished by prescription in prejudice of every class of persons, including juridic persons * * *

Notwithstanding the provisions in the foregoing paragraphs, the national vacant lands are not prescribable."

Panama has ratified the Pan-American Code of Private International Law (p. 99 above).

PARAGUAY.

Civil Code (1889):

"Art. 34. Also foreign states, each one of their provinces or municipalities, establishments, corporations or associations existent in foreign countries and which exist therein under like conditions with those of the preceding article, are juridic persons."

Art. 3951. The National or Provincial State, and all juridic persons are subejct to the same prescriptions as private individuals, with regard to their properties or rights which are susceptible of being private property, and they may likewise plead prescription."

Prescription has been successfully pleaded against the Paraguayan Government in an action by it to rescind a con-

tract of sale of land on the ground of mistake, in *Fisco contra Saguier y Riquelme*, reported in *Fallos y Disposiciones del Superior Tribunal de Justicia*, 1899, page 333.

By law of September 3, 1889, Paraguay ratified the Montevideo Treaties of Private International Law (pp. 96-7 above).

PERU.

Peru has ratified the Pan-American Code of Private International Law (p. 99 above).

IMPERIAL RUSSIA.

Civil Laws Volume X, Part 1, Code of Laws of the Russian Empire, Art. 694 Note, Annex Art. 1 (1837):

> "The legal term, established for beginning of litigation and action concerning both immovable and movable property, as well between private parties as between them and the State Treasury, is ten years. * * *"

This provision of the Russian Civil Code was held by the highest Russian court of appeal, the Ruling Senate, to apply to actions wherein the sovereign or an agency of the sovereign was a party. Under this provision the Imperial Russian Government was held by the Ruling Senate to be barred in actions brought by its agencies in the following cases: No. 60 for the year 1879; No. 858 for the year 1874; No. 325 for the year 1879 and No. 72 for the year 1879.

In the first case, No. 60 of 1879, a Representative of the Treasury Department brought an action to recover damages sustained by the Treasury Department and caused by a fire. On appeal to the Senate, that Court held:

> "* * * the main grounds for the decision of the Appellate Division are based on the fact that the ten year period of statutory prescription had run from the time

of the fire; such ruling of the Appellate Division is in full accord with the provisions of the law concerning limitation of actions (Art. 213 of Vol. X, Part 2, and Art. 694 of Vol. X, Part 1), by virtue of which provision the ten year period for bringing actions for damages sustained by unauthorized or illegal acts starts to run from the time when the cause of action accrues, and when an action can be brought to recover such damages, i.e., from the time when the damages were actually inflicted * * *; *the law does not provide for any exceptions to this general rule for the computation of the period of limitations with respect to State agencies or governmental institutions.*"

In the second decision above mentioned, No. 858 of 1874, a representative of the Department in Charge for State Property brought an action against a contractor for breach of contract and for damages sustained thereby by the Government. The defense of the statute of limitations was interposed. The Court held that under Sec. 694 of Vol. X, Part 1, all actions are barred by the general ten-year period of prescription, irrespective of whether the parties to the litigation are private citizens or Government institutions, saying:

> "No exceptions have been provided for with reference to claims of the Treasury arising out of the nonperformance by private individuals of their obligations under contracts entered into between the State and private individuals for the supply and delivery of goods to the State."

SOVIET RUSSIA.

Civil Code (1923):

> "Art. 44. The right to institute actions shall terminate upon the expiration of a three-years period (statutory limitation) unless some other term of statutory limitation is established in the law."

Soviet law does not recognize acquisitive or possessory prescription but does recognize extinctive prescription (limitations). Hence cases can be cited in which the defense of acquisitive prescription has failed in an action brought by the Soviet State. But in *Administration of Siberian Railroads* v. *Representative of the Superior Council of Peoples Economy,* in Collection of Decisions of the Civil Cassation Collegium of the Supreme Court of the R. S. F. S. R. (1929), No. 40, page 51, Case No. 31470 for the year 1924, the Supreme Court of Soviet Russia applied extinctive prescription (limitations) against the State agency which was a party to the litigation. A ruling entitled *Explanation of Plenum of Supreme Court of R. S. F. S. R., Protocol No. 10,* June 29, 1925 has been cited for the proposition that the statute of limitations does not apply to suits by the Soviet State or its agencies; but thereafter the Presidium of the Supreme Court of the R. S. F. S. R., affirming a decision of the Civil Cassation Department, in effect restricted the decision of June 29, 1925 to ownerless property which, by virtue of Civil Code Art. 68, was conceived as State property. Collection of Interpretations of the Supreme Court of the R. S. F. S. R. (State Law Publishing Concern, Moscow 1930), page 45.

On April 1, 1929 the Civil Cassation Collegium of the Supreme Court of the R. S. F. S. R. applied the three-year statute of limitations to an action brought by the Moscow Soviet of National Economy, a State agency, to recover rental from citizens for premises occupied by them in a nationalized building. Decisions of the Cassation Collegium June 17, 1929, Case No. 3854. The Court said:

"The Civil Cassation Collegium finds that the decision of the court in the part of the refusal to apply Article 44 of the Civil Code to the present litigation of the parties dealing with the amount of the recovery is incorrect on the following grounds: pursuant to the interpretation of the Plenum of the Supreme Court of the R. S. F. S. R. of June 29,[19]25, the statute of limitation does not extend to actions of State organs for the recovery of property, whereas in other cases Article 44 of the Civil Code retains its effect also in the case of State organs.

The case at Bar deals with the recovery from the defendants of rental money, that is, the claim arises out of contractual relations; consequently, the court had no ground for the refusal to apply Article 44 of the Civil Code."

Other cases such as *Narkomprod* v. *Moxselprom*, April 17, 1923, 2 Dec. V. A. K. (Supreme Arbitration Council) No. 98; *Saratov Gubkomotdel* v. *Riazan-Ural R. R.*, May 3, 1923, 3 Dec. V. A. K. No. 106, being actions between Soviet State institutions, refused to apply the three-year statute of limitations on the ground that the actions were administrative actions involving public rights, not civil actions involving civil rights. It is indisputable, however, that an action by a foreign sovereign in the courts of Russia, if permitted, would be held not to involve public rights or to be an administrative action and would be subject to the three-year statute of limitations.

SALVADOR.

Civil Code (1860):

"Art. 2407. The rules relating to prescription are applied equally in favor of or against the State, churches, municipalities, national establishments and corporations, and private persons who have the free management of their own [property and rights]."

Salvador has ratified the Pan-American Code of Private International Law (p. 99 above).

SPAIN.

Civil Code (1888):

"Art. 35. The following are juridic persons:

1. Corporations, Associations and Foundations of public interest recognized by the law. * * *

2. Associations of private interest, whether civil, mercantile or industrial, to which the law concedes their own personality, independent of that of each one of the associates.

Art. 38. Juridic persons may acquire and possess properties of all classes, as well as contract obligations and exercise civil or criminal actions, in conformity with the laws and rules of their constitution.

Art. 1932. Rights and actions are extinguished by prescription to the prejudice of every class of persons, including juridic persons, in the terms provided by the law. * * *"

In Spain as elsewhere foreign states are juridic persons, subject to the local rule of prescription or limitations. Lasala-Llanas, *Sistema de Derecho Civil Internacional e Interregional* (Madrid, 1933), page 96 says:

"Foreign States, in their quality of juridic persons, as foreign public corporations, have capacity to acquire and exercise civil rights and to contract obligations of like class in Spanish territory, without other restrictions than those which treaties or special laws may determine.

Neither the laws nor the decisions offer particular rules concerning the civil personality of foreign States. Practically, it is supposed that such capacity is recognized in the same regimen of equality as other juridic persons, at least in the acquisition and exercise of those

civil rights necessary for the fulfillment of the proper ends of the State in the political, administrative and international order."

URUGUAY.

Civil Code (1868):

"Art. 21. All individuals of the human species are persons. The State, the fisc, the municipality, the church and the corporations, establishments and associations recognized by public authority are considered to be juridic persons and consequently capable of civil rights and obligations.

Art. 1194. The State, with respect to properties susceptible of private ownership, the public establishments and corporations, are subject to the same prescriptions as are private individuals, and they may oppose prescription as private individuals may. * * *"

By law of October 3, 1892 Uruguay adhered to the Montevideo Treaties on International Civil Law and Procedural Law (pp. 96-7 above).

VENEZUELA.

Civil Code (1922):

"Art. 17. The Nation, the political entities which compose it, the churches, universities, and, in general, all moral beings or bodies of public character, are juridic persons and therefore, capable of rights and obligations * * *

Art. 2032. The State as to its patrimonial properties, and all juridic persons, are subject to prescription, the same as individuals."

Venezuela has ratified the Pan-American Code of Private International Law (p. 99 above).